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THE PUEBLO: A JURIDICAL EXAMINATION OF THE
CONSIDERATIONS INVOLVED AND THE ALTERNATIVES
AVAILABLE UNDER EXISTING INTERNATIONAL LAW
AS APPLICABLE TO A COASTAL STATE'S SEIZURE
OF A FOREIGN MAN-OF-WAR

by

Robert Boasberg

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A COASTAL STATE'S SEIZURE OF A FOREIGN MAN-OF-WAR

By

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//

Bachelor of Science in Business Administration, September 1962
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the Faculty of
The National Law Center
of The George Washington University in partial satisfaction
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Master of International Law

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Thesis directed by

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I INTRODUCTION

On August 5, 1945 the United States of America dropped the first atomic bomb on Hiroshima, Japan. This event plunged the world into a new era in which massive destruction through atomic fission could be easily accomplished. Since that time humankind has been desperately attempting to evolve itself so as to be able to cope with the new environment to which his technical ingenuity has brought him. World diplomatic difficulties and international intrigues are basically no different today than those of the last few centuries. Nor has mankind appreciably evolved during this period. Yet his ability to apply knowledge to his benefit and, more terrifying, to his own obliteration, has sent him searching for an effective means to develop a world order system capable of preventing his own destruction.

Unfortunately, no ready formula exists. Nor does it appear that once it is found it will be capable of immediate application. A slow transition is inevitable. During this stage of evolution, rules and a means of enforcement are necessary to prevent the machinations of men and nations from completely destroying the civilization it has taken so long to

2. DISCUSSION

On August 1, 1945 the United States of America declared the first atomic bomb on Hiroshima, Japan. This event changed the world into a new era in which nuclear destruction through atomic fission could be easily accomplished. Since that time mankind has been desperately struggling to control itself as to be able to cope with the new environment in which it exists. Technical ingenuity has brought him a world which is still cut off and international relations are basically no different today than those of the last few centuries. For the scientific revolution which existed during that period, yet the ability to apply knowledge to his domestic and, more especially, to his own civilization, has made his searching for an effective means to develop a world order system capable of preserving his own civilization.

Consequently, no really formal system, now known as appears that there is no doubt it will be capable of immediate application. A new civilization is being developed, and this stage of evolution, which has a sense of movement and movement is present the development of new and unique ideas completely reorganizing the civilization is now being laid out.

develop. Only law, especially the science of international law, can form the keystone upon which we can successfully complete the odyssey. The prize is more than peace, it is existence. The perils comprise more than the horrors of war and economic waste but promise total obliteration.

The world is divided into two ideological camps. The one maintains that the economic and political structure of its society should be determined by the will of all the people as much as possible for an orderly society. The other adopts an ideology which claims that the avaricious tendencies of men by their nature create strata of society thereby providing oppression and injustice, and until the ultimate economic state of perfect and equal sharing of resources is reached the State must completely control society to achieve the destruction of all strata of society. The United States leads the "free" nations as it is at present the greatest economic and political State of that bloc of nations. The other is represented by the Union of Soviet Socialist Republics, also a military superpower. Both States are nuclear giants as well, and between them have the capability of destroying the planet they both share.

Since the conclusion of the Second World War historical developments have created a confusion of political and economic entanglements which have placed the world on the brink of nuclear obliteration. Although these monolithic States have

devotion. Only law, especially the science of international law, can form the keystone upon which we can successfully construct the edifice. The place is once again under, it is existence. The people's conscience must be the basis of law and economic science can become a true religion.

The world is divided into two political camps. The

one originates from the economic and political structure of

the society which is determined by the will of all the people

as much as possible for an orderly society. The other camp

is ideology which claims that the economic structure is

not by itself nature. It is a result of human history, human

oppression and injustice, and until the ultimate economic structure

is reached and human history of economic structure is reached the

must necessarily control society by means of the structure of

all aspects of society. The latter camp is the "left".

Neither of us is at present the present economic and political

state of that social system. The world is a continuous

the history of social evolution, and it is a history of

power. The history of social evolution is a history of power.

There is no doubt that the history of social evolution is a

history of power.

There is no doubt that the history of social evolution is a

history of power.

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history of power.

ultimately begun to appreciate the vast destructive force each has at its disposal and now attempts to establish means by which it can prevent an accidental destruction of civilization, the third world, comprising over one hundred new and weaker states, is continually in flux as each vies for advantage and influence. The result is a game of Russian roulette where the international commitments of these nuclear giants, both of which desire to win over to their side the uncommitted nations, are forced to move and counter move and continually escalate international pressures in an effort to maintain a balance of power.

The struggle between the giants for nuclear superiority led them to ignore the danger inherent in the spread of weapons of mass destruction to other States. In 1968, only after at least three other States have developed the capacity to manufacture and deliver nuclear weapons, have the United States and the U.S.S.R. agreed on a Nuclear-Non-Proliferation Treaty. This could well be too little and too late since France and Communist China, both of whom possess nuclear weapons, have refused to become parties to the Convention as have the other States such as Israel and West Germany--who have the capability of manufacturing such weapons systems. The threat of a nuclear holocaust initiated from Nations other than the United States or the U.S.S.R. is a reality both States must consider in the conduct of their international relations.

Nevertheless these great States, knowing the risk of war, are compelled to continue developing more powerful weapons in an attempt to remain at least partially invulnerable to an attack against them. Both States have secret services which conduct intelligence-gathering operations, whether overt or covert, so that they may each remain as completely informed as possible about the other side. And each is required, often unwillingly, to fully live up to its agreements and alliances, such as in the case of the war in Viet-Nam, to demonstrate its strength and resolve to maintain its honor and purpose.

Both States, as part of their intelligence-gathering operations, use their warships, among other devices, to gather information regarding the operations of the other camp. The United States has taken the position that intelligence ships, especially when they are foreign warships, are immune from seizure or, in fact, any interference on the high seas.¹ Soviet intelligence ships regularly take station in South Korean waters, the waters off the coast of Viet-Nam, and at the United States Air Base in Guam. They are also stationed off the harbors of San Francisco and Charleston, South Carolina, observing the movement of the nuclear submarines of the United States.² These vessels have not been interfered with, although they remain under surveillance.

¹Dep't. State Bull., LVIII (Feb. 12, 1968), p. 197.

²Id., p. 189.

[illegible]

the honor and glory of the nation, to demonstrate its strength and ability to stand up for its principles and interests, even in the face of the most powerful and aggressive nations. It is essential that we maintain a strong and unified front, and that we be prepared to stand up for our principles and interests at all times. We must not allow ourselves to be divided or weakened by internal dissension or by the actions of any one nation. We must stand together, and we must stand firm.

North Korea, as part of Soviet intelligence-gathering operations, use their weapons, means of transport, etc. Further information regarding the operations of the system came. The United States has taken the position that Soviet forces may, especially when they are facing difficulties, be removed from North Korea, in fact, they have been removed on the high seas.⁴ Soviet intelligence also indirectly took action in North Korea matter, the removal of all kinds of weapons, and of the United States Air Force to North Korea and also stationed all the harbors of the Republic of Korea. North Korea, observing the movement of the United States forces of the United States.⁵ When Soviet forces were removed from North Korea, it was a great victory for the United States.

The seizure of the Pueblo brought a new dimension into international law. The modern world, with its rapid means of transportation and communications, abetted by weapons systems capable of swift and terrifying world obliteration, adds greatly to the difficulty of attaining and maintaining minimum world public order. Today it is no longer possible to enforce international law unilaterally and the application of military force, even by a super-state against a much weaker nation, is a decision only the most foolhardy would embrace without careful reflection.

Yet it would be irrational to allow the public order of the oceans to be destroyed for lack of effective sanctions.

This study will examine, using a detailed analysis of the Pueblo incident as an example, the alternatives available to competing state interests in the use of the world's oceans for self-defensive intelligence-gathering where these rights conflict with rights of a state to guard against attack and subversion, recommending a solution which can most easily fit into our present world public order system in such a manner that an optimum level of freedom in the use of the world's seas may be maintained at a minimum risk of world annihilation. The importance of an immediate, practical solution, short of war, in the seizure of a foreign warship rests in the fact that a future solution under an improved world

order system is of little value when the hazard of nuclear obliteration from such activities is a current fact. This study will be more timely if a presently valid solution capable of immediate implementation in an existing world order system is proposed, rather than finding a solution which will depend upon the happening of a number of fortuitous events prior to its becoming a valid answer to a present problem.

order system is of little value when the system is under
 operation from such activities as a subject fact. This
 study will be held only if a previously held system
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II HISTORICAL BACKGROUND

A. Coercive Situation in Korea

1. The Korean War Era.

At the end of the Second World War Japan was disposed of Korea, which was then occupied in the north by the U.S.S.R. and in the south by the United States. Kim Il Sung headed the Communist North and the United States created a democratic government in South Korea. The Russians not only fought against the establishment of such a government, but vetoed her admission into the United Nations when she failed in her main objective. American troops withdrew in June 1949 amid speculation that a relatively strong North Korean, Russian-trained, army would descend on the relatively weak Republic of South Korea. Nevertheless, Secretary of State Acheson stated that South Korea was not within the United States defense perimeter.³

On June 25, 1950 that which was so much feared occurred. At approximately 4:00 A.M., local time, the bombardment began. North Korean troops invaded the South at eight o'clock in the

T. A. Bailey, A Diplomatic History of the American People (New York: Appleton-Century Cofts, 7th ed., 1964), p. 819.

morning and two hours later a declaration of war was broadcast by the North Korean Government.⁴ The United Nations Security Council met in an emergency meeting at Lake Success and by a 9-0 vote (Yugoslavia abstaining) found North Korea guilty of breaking the peace. It demanded that the North Korean Government pull back its troops to the 38th parallel.⁵ The representative of the U.S.S.R. did not vote. That delegation was boycotting all United Nations proceedings in protest against its failure to accept the delegation of Communist China in the seat of the Security Council occupied by the Nationalist Chinese representative. In the balance against ignoring the invasion of South Korea by the Communist North rested not only the probability of a new world conflagration but, more important, the very existence of the United Nations as an effective instrument for maintaining the peace and security of the world. While the United States was urging intervention by the United Nations she began, independently, to rush arms and military assistance to the embattled South Korean regime.⁶ When North Korea ignored a second United Nations order for withdrawal, the Security Council authorized its member nations to use armed force in repelling the invasion of South Korea and restoring international peace and security.⁷

⁴N.Y. Times, June 25, 1950, at 1, col. 1.

⁵Id., June 26, 1950, at 1, col. 8; ⁶Id., col. 7.

⁷Id., June 28, 1950, at 1, col. 2.

meeting and two hours later a resolution of the United Nations

passed by the North Korean Government.¹ The United Nations

Security Council met in an emergency session at Lake Success

and by a 9-0 vote (Yugoslavia abstained) found North Korea

guilty of breaching the peace. It demanded that the North

Korean Government pull back its troops to the 38th parallel.²

The representatives of the U.S.S.R. did not vote. That day

action was demanded of all United Nations members in

protest against the failure to accept the demand for

Communist China in the seat of the Security Council occupied

by the Nationalist Chinese representative. In the debate

against ignoring the interests of South Korea by the Communist

North Korea not only the probability of a new world conflict

question but, more important, the very existence of the United

Nations as an effective instrument for maintaining the peace

and security of the world. While the United States was urging

intervention by the United Nations she began, independently,

to send her own military assistance to the Korean people.

Korean regime.³ When North Korea ignored a second United

Nations order she withdrew, the Security Council authorized

the member nations to use armed force in repelling the invasion

of South Korea and restoring international peace and security.⁴

¹U.N. Times, June 11, 1950, at 1, col. 1.

²Ibid., June 26, 1950, at 1, col. 3; ibid., July 1, 1950, at 1, col. 1.

³Ibid., June 26, 1950, at 1, col. 3.

President Truman appointed General MacArthur to command United States forces in Korea pursuant to the United Nations authorization. The British Government placed its Pacific Fleet under General MacArthur's command, as did Australia and New Zealand, on June 25, 1950.⁸ President Truman, however, made it clear that the United States was not at war, stating that this was a police action for the United Nations against an "unlawful bandit attack on the South Korean Republic."⁹ His position was further enforced when the United Nations authorized the United States to form a Unified Command with General MacArthur as Supreme Commander, and permitted that Command to use the United Nations flag.¹⁰

The fighting continued for over three years. The first meeting for armistice talks began at Kaesong on July 10, 1951, but a truce was not declared until the signing of the armistice agreement on July 27, 1953.¹¹

2. The Events Following the Armistice.

The truce ended the fighting between the United Nations and the North Korean Government. It failed to settle any of the issues. The governments of both halves of Korea were, as ever, determined to reunite Japan's former possession. In

⁸N.Y. Times, June 29, 1950, at 1, col. 2.

⁹Id., June 30, 1950, at 1, col. 5.

¹⁰Id., July 9, 1950, at 1, col. 5.

¹¹Id., July 27, 1953, at 1, col. 8, and 6, col. 5.

1954, the United States Air Force reported that the North Koreans attacked an RB-45 aircraft over neutral waters.¹² Soon thereafter followed the seizure of two Canadian soldiers in the neutral, demilitarized zone by North Korean troops.¹³ In August 1955 the South Korean Government charged that the North Koreans were floating anti-personnel bombs down the Han River estuary, culminating in thirteen explosions which caused six deaths and seven injuries to civilians.¹⁴ Incidents continued through 1955 and 1956. In June 1957 the United Nations Commissioners advised the Communists that due to the rearmament of the North Korean Army, it would no longer be bound by the truce provisions requiring the maintenance of the status quo ante regarding weapons and would rearm the South Korean Army with modern weapons.¹⁵ Repeated violations of the 1953 truce were also cited.

Seizures of fishing vessels, murders, ambushes, and various other terrorist tactics, in unending repetition, continued through the remaining Fifties and early Sixties. The peace treaty, the difficult goal of the 1950's, became a virtual impossibility as the 1960's became history.

By 1967 ambush and infiltration activities by North

¹²N.Y. Times, Feb. 1, 1954, at 1, col. 2.

¹³Id., Mar. 18, 1954, at 3, col. 5.

¹⁴Id., Aug. 7, 1955, at 14, col. 1.

¹⁵Id., June 21, 1957, at 1, col. 5.

1954, the United States Air Force reported that the Korean
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 Soon thereafter followed the seizure of two Canadian soldiers
 in the neutral, demilitarized zone by North Korean forces.¹²
 In August 1955 the South Korean Government claimed that the
 North Koreans were flooding anti-personnel bombs down the
 Han River estuary, contaminating its fisheries and causing
 six deaths and seven injuries to civilians.¹³ Inci-
 dents continued through 1955 and 1956. In June 1957 the
 United Nations Commission advised the Government that due
 to the treatment of the North Korean army, it would no longer
 be bound by the truce provisions regarding the maintenance of
 the status quo and might acquire weapons and would cause the
 South Korean Army with modern weapons.¹⁴ Reported violations
 of the 1953 truce were also noted.
 Violations of truce provisions, landings, seizures, and
 various other hostile tactics, in numerous instances,
 continued through the remaining truce and early 1958.
 The peace treaty, the ultimate goal of the 1953 truce,
 a virtual impossibility in the 1950's became almost
 an impossibility and hostilities continued to erupt.

¹¹U.S. State, Rel. 1, 1954, at 1, col. 3.

¹²U.S. State, Rel. 16, 1954, at 3, col. 6.

¹³U.S. State, Rel. 17, 1955, at 16, col. 1.

¹⁴U.S. State, Rel. 21, 1957, at 1, col. 4.

Korea were reported to be on the increase and two supply trains were sabotaged in September.¹⁶ In the same month North Korea charged that South Korean warships were violating her territorial seas. She also fired upon and sank a South Korean fishing vessel.¹⁷ On January 22, 1968 The New York Times reported that thirty-one infiltrators had entered South Korea on an unsuccessful mission to assassinate the South Korean President.¹⁸

B. The Pueblo Incident of January 23, 1968

1. The Factual Account.

At approximately 12:00 P.M., Eastern Standard Time, on January 23, 1968, naval vessels of the North Korean People's Democratic Republic surrounded the United States naval vessel PUEBLO (AGER-2) which was at that time cruising off the coast of North Korea, boarded her, capturing her crew, and took her into the port of Wonson on North Korea's eastern coast.¹⁹ The incident began approximately two hours earlier when a North Korean coastal patrol boat approached the Pueblo and, using international signals, first requested the ship's nationality, and then ordered the Pueblo to "Heave to or (it would) open fire." Pueblo replied that it was in international waters.²⁰

¹⁶N.Y. Times, Sept. 14, 1967, at 21, col. 1.

¹⁷Id., Sept. 22, 1967, at 3, col. 2.

¹⁸Id., Jan. 22, 1968, at 3, col. 3.

¹⁹Id., Jan. 24, 1968, at 1, col. 8; ²⁰Id., at 15, col. 1.

The patrol boat continued to circle the Pueblo. Three other patrol craft belonging to the North Korean Navy joined their sister-ship and the four of them surrounded the Pueblo, closed in and boarded her. The actual boarding occurred at 1:45 P.M.²¹ A few shots were fired across the Pueblo's bow. The New York Times reported, based on the testimony at the Navy investigation of the incident, that Captain Bucher was injured and a Fireman named Hodges was killed when one of the Korean vessels' missiles penetrated the Pueblo's superstructure, causing loose metal fragments to fly about the vessel.²²

2. The Issue of Location.

Claims by the United States:

The United States Department of Defense reported that the Pueblo was boarded 25 miles off the coast of North Korea.²³ The reported position of the Pueblo at the time of the boarding was 127°54.3'E; 39°25'N.²⁴

The United States took a strong official position; President Johnson, in a speech given on the twenty-sixth of January, saying in part ". . . . This week the North Koreans

²¹N.Y. Times, Jan. 24, 1968, at 1, col. 6.

²²Id., Jan. 23, 1969, at 1, col. 7.

²³Id., Jan. 24, 1968, at 1, col. 8.

²⁴Id., at 14, col. 5. Although this position was later revised to 16 miles off the North Korean coast, both positions were beyond the 12-mile limit of territorial waters claimed by North Korea.

The patrol boat continued to circle the Enrica. Within three
 patrol craft belonging to the North Korean navy passed within
 1000-yards and the four of them surrounded the Enrica, which
 in and boarded her. The actual boarding occurred at 1:45 a.m.²¹
 A few hours were time before the Enrica's crew. The two Korean
 were reported, based on the testimony of the navy investigators
 tion of the incident, that Captain Gordon was injured and a
 Russian named Rogov was killed when one of the Korean vessels
 missiles penetrated the Enrica's superstructure, burning holes
 metal fragments to fly about the vessel.²²

2. The Enrica's location.

Citing by the United States:

The United States Department of Defense reported that
 the Enrica was located 25 miles off the coast of North
 Korea.²³ The reported position of the Enrica at the time of
 the boarding was 37°54'N; 124°51'W.²⁴

The United States took a strong official position
 regarding the incident, in a speech given on the twenty-third of
 January, saying in part: "... This case the North Korean

²¹ U.S. Navy, Vol. 34, 1963, at 1, col. 4.

²² Id., Vol. 32, 1961, at 1, col. 3.

²³ Id., Vol. 34, 1963, at 1, col. 4.

²⁴ Id., at 14, col. 3. Although this position was later
 revised to 14 miles off the coast of North Korea, the position
 was beyond the 12-mile limit of territorial waters claimed
 by North Korea.

committed yet another wanton and aggressive act by seizing the American ship Pueblo and its crew in international waters. Clearly this cannot be accepted."²⁵ Secretary of State Dean Rusk declared that the United States was determined to get the Pueblo back ". . . by whatever means it takes."²⁶ And, in a speech before the Brooklyn Cathedral Club in New York City on January 25, Secretary Rusk emphasized ". . . . The seizure of a United States naval vessel in international waters is without precedent and is intolerable. And there can be no satisfactory result, short of prompt, may I say immediate, release of that ship and its officers and crew."²⁷

This was followed by a statement in the United Nations by Ambassador Goldberg, our then representative to that international organization, which clearly stated the position of the United States:

" The strict instructions under which the Pueblo was operating required it to stay at least thirteen nautical miles from the North Korean coast. While my country adheres to the three-mile rule of international law concerning territorial waters, nevertheless the ship was under orders whose effect was to stay well clear of the twelve-mile limit which the North Korean authorities have by long practice followed."²⁸

The Ambassador alleged three points in his speech:

First, that the location of the Pueblo in international waters

²⁵Dep't. State Bull., LVIII (Feb. 12, 1968), p. 189.

²⁶Id.; ²⁷Id., p. 192; ²⁸Id., p. 194.

committed yet another wrong and aggressive act of sailing
The American ship Posid and the crew in international waters.
Clearly this cannot be accepted.¹⁵ Secretary of State Dean
Rusk declared that the United States was determined to not
the Posid case "... by whatever means it takes."¹⁶ And
in a speech before the American Chamber of Commerce in New York
City on January 25, Secretary Rusk emphasized "... The
violation of a United States naval vessel in international
waters is without precedent and is intolerable. And there
can be no satisfactory result, short of justice, and I say
justice, unless the ship and its crew are released."¹⁷
This was followed by a statement in the United Nations
by Ambassador Goldberg, our then representative to that body,
national organization, which clearly stated the position of
the United States:

"... The United States instructions under which the
Posid was operating required it to stop at least
certain neutral ships from the North Korean
coast. While my country adheres to the traditional
rule of international law concerning neutral
ships, nevertheless the ship was under orders when
stopped to stay well clear of the two-mile
limit which the North Korean authorities have by
long practice claimed."¹⁸

The statement stated that Posid in the speech
first, that the position of the Posid in international waters

¹⁵ Dept. of State Bulletin, February 12, 1964, p. 120.

¹⁶ Ibid., February 12, 1964, p. 120.

was fully known to the North Korean authorities; secondly, so lightly armed was the Pueblo that the North Korean patrol vessels reported it unarmed; and third, that the Pueblo was in no position to engage in a hostile, warlike act toward the territory or vessels of North Korea and the North Koreans knew this.²⁹

Ambassador Goldberg added:

"... in light of the comments of the distinguished Soviet representative on the adoption of the agenda, that Soviet ships engage in exactly the same activities as the Pueblo and sail much closer to the shores of other states. And one such Soviet ship right now is to be found in the Sea of Japan and currently is not far from the North Korean shores."³⁰

By February 2, 1968, the United States position as to its intended response, failing the immediate return of the crew and the vessel, had been moderately altered in that diplomatic efforts were to be used, rather than military coercion, in accomplishing the return of the ship, its officers and crew.³¹ The basic claim of the United States was that under international law no nation has a right to seize a warship of another nation whether on the high seas or in territorial waters. But if a foreign warship enters territorial waters, the littoral state may require it to depart

²⁹ Dep't. State Bull., LVIII (Feb. 12, 1968), p. 196.

³⁰ Id., p. 196; ³¹ Id., Feb. 19, 1968, p. 223.

was fully known to the North Korean authorities; obviously, so highly valued was the Pravda that the North Korean papers were also reported to contain; and third, that the Pravda was in no position to regard in a hostile, unkind and biased manner any vessels of North Korea and the North Korean

... in light of the comments of the distinguished Soviet representative on the situation in the Soviet Union, that Soviet troops engaged in the same manner as the People's will such others in the course of their activities. And one more Soviet army light was to be found in the Red of Japan and ultimately in the North Korean areas."

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its intended response, failing the immediate remedy of the
and the vessel, had been previously altered in that
diagnostic effects were to be used, rather than military
coercion, in accomplishing the return of the ship, its crew
and crew.¹¹ The basic claim of the United States was that
under international law no nation has a right to seize a
vessel of another nation whether in the high seas or in
territorial waters. And if a nation seizes a vessel in
territorial waters, the littoral state may require it to release

[illegible]

immediately, and no more.³²

Immediately after the incident was reported it was referred to as "a breach of international law amounting to an act of war"³³ and as "an act of piracy"³⁴ by two senators. Although these are not official positions of the Administration, they indicate the anger of the United States at receiving the news of the seizure.

The Claims of North Korea:

A similar analysis of the North Korean position is difficult because they not only lack a forum such as the United Nations in which to voice their claims and be subject to rebuttal, but they also tend to use news releases and the like to propagandize rather than actually attempt to bolster their international importance. When arguments against the West are expounded only for consumption in the world market of public opinion, it is almost impossible to give a fair analysis of their contents.

North Korean authorities claimed that the Pueblo had intruded into the territorial waters of the People's Democratic Republic and was carrying out "hostile activities." The Pueblo

³²Dep't. State Bull., LVIII, (Feb. 12, 1968), p. 302. An address given by Secretary of State Dean Rusk in which he said in part: "The most essential fact is that under accepted international law North Korea has no right to seize the Pueblo --either on the high seas or in territorial waters. The Convention on the Law of the Sea adopted in 1958, makes it entirely clear that, if any warship comes inside the territorial

³³N.Y. Times, Jan. 24, 1968, at 1, col. 7.

³⁴Id., at 14, col. 7.

was referred to in North Korean news releases as "an armed spy boat of the United States imperialist aggressor force."³⁵ The Pyongyang broadcast alleged that "while on the sea they (the United States) sent an armed vessel of the United States forces to intrude into the waters off Wonsan and perpetrate serious provocation."³⁶ They claimed that warnings had been broadcast to the United States to keep out of North Korean waters and that the United States armed vessel had used the cover of South Korean fishing fleets to intrude into North Korean waters.³⁷

The New York Times, on April 17, 1968, carried an article stating that North Korean authorities released photographic copies of documents which they claim were seized from the Pueblo and which prove beyond doubt that the Pueblo had intruded into North Korean territorial waters and, indeed, that it had orders to do so in spite of the claims of the United States Government to the contrary.³⁸ Beyond this statement, no

waters, the coastal state can require it to leave but does not have the right to seize it." It should be noted that North Korea is not a party to that Convention. Yet, considering the number of nations (49) which ratified that Convention (see U.S. Naval War College, International Law Studies 1959-60, app. J, p. 264) it could be considered by some to be generally accepted international law binding on all nations. The issue, however, is not as cut and dried as the Secretary's remarks might lead one to believe.

³⁵N.Y. Times, Jan. 24, 1968, at 1, col. 8; ³⁶Id.

³⁷Id., Jan. 27, 1968, at 28, col. 1.

³⁸Id., Apr. 17, 1968, at 3, col. 3.

was referred to in North Korean news releases as "an enemy spy boat of the United States Imperialist Government Force."³⁵ The Pyongyang newspaper alleged that "while on the way (the United States) sent an armed vessel to the United States forces to intervene into the waters off Korea and to participate in the intervention."³⁶ They claimed that although the boat was destroyed by the United States to keep out of North Korean waters and that the United States army vessel had used the cover of North Korean fishing boats to intervene from North Korea waters.³⁷

The New York Times, on April 14, 1950, carried an article stating that North Korean authorities released press releases copies of documents which they claim were seized from the Nautilus and which prove beyond doubt that the Nautilus had been used to transport North Korean military weapons and, indeed, that it had passed on to the ships of the United States. ³⁸ Against this background, the

author, the central state and regional is to have and does not have the right to seize it. It should be noted that North Korea is not a party to that Convention. Yet, considering the number of nations (over 100) which ratified that Convention (1950-51), it is not surprising that the Nautilus was seized. International Law (1952-53), p. 2, p. 261. It would be surprising to have to be surprised to find that international law relating to all nations. The law, however, is not an end and should be the Secretary's concern about that can be delivered.

³⁵N.Y. Times, Nov. 22, 1950, at 1, col. 1.

³⁶Id., Nov. 27, 1950, at 1, col. 1.

³⁷Id., Nov. 27, 1950, at 1, col. 1.

attempt was made by North Korea to prove, based on independent evidence, that her claims were valid. The documents were never released to the public. Although many questions arise as to the validity of the documents themselves or of the North Korean allegations, it will not be examined here as it is beyond the function of this paper to prove or disprove the factual evidence and circumstances which surround this incident. It remains that the North Korean Government based its actions upon the intrusion of the Pueblo into that Republic's territorial seas--a fact vehemently denied by the Government of the United States.

3. The Dispute as to the Vessel's Function.

A General Description of the Pueblo:

The Pueblo is one of a class of ships designated as Auxiliary General Electronics Research ships (AGER). Every ship of the United States Navy has a designation and category symbol to identify its purpose, function, and classification. The "A" can be said to stand for Auxiliary, as the purpose of the vessel is not to directly assist in attacking an enemy by firepower but rather to serve combatant vessels.³⁹ These particular vessels are equipped with highly sophisticated electronic gear and are used to gather a wide range of data on and concerning the oceans, their contents, ecology, floor and

³⁹ U.S. Naval Institute, The Bluejackets Manual (17th ed., 1965), pp. 234-37.

and constructive and common, shall continue, and shall be
absolutely and not only to secure a wide range of aid on
these particular vessels and subject to the right of withdrawal
on any of the vessels and subject to the right of withdrawal.
purpose of the vessel is not to directly assist in building
vessel. The "A" can be said to assist the vessel, as the
party vessel to identify its purpose, location, and character
ship of the United States Navy, and a communication and con-
sultation General Maritime Research (GMR). Every
The people in one of a class of ships designed as

3. The rights as to the vessel's position. A General Maritime Research (GMR).

Government of the United States.

Republic's territorial zone--a fact voluntarily stated by the
United States upon the signature of the Treaty. The fact
this incident. It is stated that the United States Government
prove the General Maritime Research and Research which contains
as it is beyond the function of this paper to prove or dis-
the United States Maritime, it will not be considered here
arise as to the validity of the document themselves as of
were never released to the public. Although many questions
pending evidence, that the claim was valid. The document
attempt was made by the United States to prove, based on the

superadjacent air space. They store and examine the information acquired for use in developing knowledge about the sea and thereby expanding man's ability to use the resources of the seas. Their information can also assist the combatant vessels of the United States Navy in fulfilling its defensive functions through such research. Depending upon the sophistication and purpose of the equipment these ships can analyze radio and radar signals, gather information on ocean sounds, and a great variety of other information which may be useful to the Government of the United States. It might be added that the term "spy ship" is inaccurate and misleading, although it has been used by various commentators, newspapers, and the like to describe the vessel.

These ships were converted from United States Army diesel-powered light cargo ships (AKL) to their present naval mission--intelligence-gathering. The vessels displace approximately 906 tons of water. They measure 179 feet from stem to stern; are 33 feet abeam and have a draft of 10.2 feet. Their approximate maximum speed is 12.2 nautical miles per hour (2,000 yards). The Pueblo carried a complement of six officers, seventy-five crew members, and two civilian personnel.⁴⁰

The New York Times reported that according to informed, but undisclosed, sources the Pueblo is crammed with various electronic and sonar listening devices and recording equipment.⁴¹

⁴⁰N.Y. Times, Jan. 24, 1968, at 15, col. 2, and Mar. 24, 1968, at 44, col. 4; ⁴¹Id.

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used in previous experiments and the five to

These values were converted to the following:

Figure 5 shows a typical set of (TGA) results, comparing the thermal stability

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U.S. Army, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 25

A substantial amount of the equipment was used to collect military intelligence information. The ship allegedly had the capacity to intercept submarine messages, and record the sounds of Russian submarines. It also had the capability to locate the positions of land-based radar equipment and measure the wave lengths. This would permit attacking aircraft, by duplicating the wave patterns of a radar net, to remain undetected until it is too late for the defensive apparatus of the nation being attacked to effectively mobilize against the approaching menace. This class of vessels also carries computers to analyze data. It is important that these ships approach as close to the source of the waves being examined as is possible, in order to get an accurate record of the wave patterns and sounds.⁴²

Claims-by-the North Korean Government:

In the propaganda statements of the People's Democratic Republic of North Korea, that Government accused the United States of directing the Pueblo to engage in hostile activities within eight miles of the North Korean coast--against its people.⁴³ These activities consisted in gathering information and electronic data from North Korea's communications and

⁴² N.Y. Times, Jan. 26, 1968, at 10, col. 1, and at 15, col. 2.

⁴³ Id., Jan. 24, 1968, at 15, col. 2.

It is possible, in order to get an accurate record of the
appearance as shown on the surface of the water being studied
possible to analyze water. It is important that these things
approaching manner. This kind of analysis also carries the
the nation being subjected to objectively realized against the
discovered until it is too late for the detection apparatus to
duplicating the same pattern of a total act, to remain in-
the wave function. This would permit recording directly, in
include the position of the wave front and position
sounds of various materials. It also has the capability to
the capacity to identify various materials, and record the
efficiency of the wave function. The wave function is
a substantial amount of the equipment was used to collect

people.⁴⁵ These activities continued in gathering information within sight and at the North Korean coast—against the threat of detection the group to whom is heavy/ criticized Republic of North Korea, that Government accused the United States Government with regard to the people's Government.

defensive radar installations.⁴⁴ The Pueblo was also charged with gathering information on the characteristic noise patterns of Soviet submarines as well as data regarding the ocean floor adjacent to the territorial waters off the North Korean coast.⁴⁵

North Korea claimed that such activities constituted spying, and alleged that this activity was aggressive. These amounted to acts so hostile that the seizure was justified as the only effective means to prevent serious injury to the people of North Korea.

Claims by the United States Government:

The United States Government officials stated that the Pueblo was not a "spy ship" in the sense that its purpose was to intrude in North Korean waters in order to carry out espionage activities. Its objective, rather, was to remain well outside of what the North Koreans claimed as their territorial seas, to carry on a surveillance of radar and radio waves, and to record "underwater sound" as well as to gather hydrographic data.⁴⁶ It was officially acknowledged that the Pueblo carried highly-classified electronics equipment for intelligence-gathering purposes.⁴⁷ The United States position, however, is that

⁴⁴N.Y. Times, Apr. 17, 1968, at 3, col. 3.

⁴⁵Id., Mar. 24, 1968, at 44, col. 4; ⁴⁶Id.

⁴⁷Id., Jan. 24, 1968, at 14, col. 8.

III THE CENTRAL ISSUES PRESENTED BY THE PUEBLO INCIDENT

The seizure of the Pueblo, a vessel classified as a warship, under international law of the sea, created new problems for the nations of the world and brought to the fore the need to either eliminate intelligence gathering by warships and military aircraft as is presently practiced by the United States and the Soviet Union or, in the alternative, establish a regime by which such activity may be pursued without the risk of a major confrontation perpetrated by a relatively small nation with substantially less to lose than the great world powers.

Since the elimination of such activities is remote indeed, this being reconfirmed by the downing of a United States Naval intelligence-gathering aircraft on April 15, 1969 at the hands of North Korea,⁴⁹ and its aftermath,⁵⁰ it is imperative that legal issues be examined and understood so that the world community can act appropriately and effectively to maintain a peaceful world order in the face of present world tensions.

⁴⁹The Washington Star, Apr. 15, 1969, at 1, col. 8.

⁵⁰Id., Apr. 18, 1969, at 1, col. 3.

III THE CENTRAL ISSUE PRESENTED BY THE GENERAL INQUIRY

The essence of the problem, as stated, is that the world, under international law of the sea, created new programs for the nations of the world and brought to the fore the need to either eliminate international boundaries by warships and military aircraft or to preserve them by the United States and the Soviet Union or, in the alternative, establish a regime by which such activity may be pursued without the risk of a major confrontation between two relatively small nations which substantially have no power in the great world power.

Since the elimination of such activities is essential, this being evidenced by the decision of a United States naval intelligence-reporting aircraft on April 13, 1950 at the time of North Korea,²⁰ and the decision,²¹ it is imperative that there be established an international law that the world community use the opportunity and effectively to maintain a peaceful world order in the case of general world decision.

²⁰ The Washington Post, Apr. 13, 1950, at 1, col. 1.

²¹ The Washington Post, Apr. 13, 1950, at 1, col. 1.

The principal issues of this study are two: First is whether a nation can legally pursue intelligence-gathering activities under the existing world public order system and within the framework of international law, most directly current international law of the sea, without becoming an aggressor state whose activities constitute a threat to or a breach of the peace under the law of nations. The second question is whether a state, under international law, should be allowed to interfere with the reconnaissance mission of a foreign state's warship which is attempting to acquire information regarding that state's defensive and offensive capabilities. Assuming some response is proper, what is the most appropriate means and by what proportionate sanctions may the minimum world public order system be maintained in adjusting the injustices arising from this clash of mutually-exclusive values?

In order to answer these principal issues many preliminary and corollary questions must be answered so that a solution may be effectively and meaningfully reached. The applicable principals of international law of the sea and their development relevant to this dispute must be examined. Since the Pueblo Incident is being used for the focal point of this paper, the interrelationship between the United States of America and the People's Democratic Republic of Korea must be analyzed. Next must follow an inquiry into whether the acts of the parties immediate to the Pueblo Incident had basis in international law as it exists for these nations and, if not,

at what points international regulation breaks down in the face of such crises and where augmentation is required.

Finally, an attempt will be made to find a practical solution to these crisis situations in an effort to give the parties guidance and a satisfactory option to war, either by action or by imposing a legal obligation to refrain from specific types of action in order that a minimum world public order system can be maintained in the face of any future crises similar in nature to that of the Pueblo seizure of January 1968.

of most public international organizations, having been the case
 of some others and their organization is required.
 Finally, no attempt will be made to find a solution
 relating to these public organizations in an effort to give the
 public authorities and a satisfactory system to be adopted by
 action of the Executive Council of the United Nations.
 Specific steps are being taken to find a solution which will
 be satisfactory to the members of the United Nations.
 Finally, it seems to me that the United Nations is the only
 organization which is capable of doing this.

IV THE APPLICABLE GENERAL INTERNATIONAL LAW OF THE SEA

A. The Concepts of Sovereignty and Jurisdiction

Sovereignty is a high degree of formal authority, virtually independent of other earthly authority. Sovereignty rests in entities called states and is manifest by the power to make laws and to rule. Sovereignty is independent within each state but is limited without the state by the rights of other sovereign states. Conduct between sovereign states is thus regulated through what is known as the "Law of Nations," manifest as frequently in its breach as in its observance.⁵¹ All independent political entities on this planet are considered to be sovereign and--together with three other qualities--a community of people settled and living together in a defined geographical area, ruled by a person or group of people under the law of the land, comprise nation-states.⁵² Due to the inter-relationships of a world made smaller by

⁵¹H. Lauterpacht, Oppenheim's International Law, Vol. 1 (8th ed., 1957), pp. 118 and 122-23.

⁵²Id.

IV. THE APPLICABLE GENERAL INTERNATIONAL LAW IN THE CASE

6. The Concept of Sovereignty and Jurisdiction

Sovereignty is a high degree of legal authority, virtually independent of other earthly authority. Sovereignty rests in entities called states and is exercised by the power to make laws and to rule. Sovereignty is independent within each state but is limited without the state by the rights of other sovereign states. Common law between sovereign states is thus regulated through what is known as the "Law of Nations". All independent political entities on this planet are entitled to be sovereign and—connected with their own rights—have a community of people, wealth and living resources in a defined geographical area, ruled by a person or group of people under the law of the land, exclusive nation-states. Due to the interrelationships of a world with entities

²¹ E. Lauterpacht, Oppenheim's International Law, Vol. 1 (8th ed., 1971), pp. 119 and 120-2.

the ever-advancing technological developments in the fields of communication and transportation, together with the complexities of a developing world economic structure, we find that --to borrow an Orwellian phrase--some states are "more equal than others" in fact, despite the international concept of equal states. Nevertheless, within the territory of each state, its government possesses the supreme authority to rule its citizens as it deems most advantageous for its social structure.

Jurisdiction is the term traditionally used to describe the area within which a state is competent to exercise its sovereignty by enforcing its policy therein.⁵³ For example, a state's competence to apply its policy to foreign vessels in its territorial sea would be an exercise of sovereignty. A state's jurisdiction is, in turn, subject to certain extensions and limitations under international law. At this point they will be referred to only briefly. Every state is entitled by international law to claim extraterritoriality--exemption from local jurisdiction from other states for visiting heads of state, its diplomatic envoys, its men-of-war, and its armed forces.⁵⁴ At the same time, the Law of Nations permits a state to exercise jurisdiction over its subjects

⁵³ M. S. Mc Dougal and W. T. Burke, The Public Order of the Oceans (1st ed., 1965), p. 182.

⁵⁴ Oppenheim-Lauterpacht, op. cit., p. 327.

traveling abroad, within its own territory, since this right is based on the individual citizen and his allegiance to his state.⁵⁵ Delimitation of the right to exercise jurisdiction as well as the requirement to restrain it has developed historically through treaty and custom and, it might be said, has placed limitations on the sovereignty of nation states in their attempts to find a means to work together.

B. State Territory and the World's Seas

1. State Territory.

The territory of a state consists of the land mass over which its government holds control and exercises its jurisdiction: the waters within the state, and those immediately adjacent to it in the situation where a state borders on the seas of the world, These being designated "internal waters." Other areas of the ocean adjacent to the external waters and the airspace above extending at least as high as manned aircraft can fly, are also subject to the jurisdiction of the adjacent state.⁵⁶ The importance of state territory rests in the fact that within this geographical area government jurisdiction and state sovereignty are virtually complete and no other political power can exercise authority within that physical delimitation.⁵⁷

⁵⁵Oppenheim-Lauterpacht, op. cit., p. 330.

⁵⁶Id., p. 460; ⁵⁷Id., p. 452.

concerning human, within the one category, since this right
is based on the individual status and his obligations to his
state.²² The character of the right to certain possessions
as well as the requirement to maintain it has developed
historically through treaty and custom and, it might be said,
has placed limitations on the sovereignty of nations where it
first appears to them a matter to their opinion.

2. Cases involving the state's duty

1. State Territory.

The territory of a state consists of the land and water
which the government has in control and exercises its juris-
diction. The water within the state, and those boundaries
adjacent to it in the adjacent water in areas covered on the
side of the water, those being designated "internal waters."
Other areas of the ocean adjacent to the national water and
the adjacent ocean territory of land as high as named are
called "high seas," and are subject to the jurisdiction of the
adjacent state.²³ The question of state territory arises
in the case when the geographical area of a state
is defined and state sovereignty is directly involved
and no other political power can exercise authority within
that physical limitation.²⁴

²² Oppenheim's International Law, 2d. Ed., p. 214.

²³ Ibid., p. 214.

The various strata of jurisdiction which a state may exercise to varying degrees is extremely important in order to treat this subject properly, and will be thoroughly dealt with immediately below. It is necessary and appropriate to introduce, at this point, the ultimate extent of state territorial sovereignty into the seas applicable to states littoral to the world's oceans.

2. The Open Seas.

The Open Seas comprise all the salt water surfaces of the globe which are connected, from a navigational standpoint, to the globe's great bodies of water; are susceptible to international surface navigation and fishing; and which do not fall within the categories of "internal waters," "maritime belts," or other specialized zones claimed by states littoral to the open seas and recognized de facto or de jure by other nations of the world. For example, the Aral Sea in Russian territory or the Great Salt Lake in the United States cannot be classified as open seas. The Chesapeake Bay, although navigable from the Atlantic, falls within the category of "internal waters" as an historic bay and thus is not part of the open seas.

The principle of "freedom of the seas" can be traced from antiquity, although from the Middle Ages throughout the nineteenth century various states claimed vast areas of the

The various means of justification which a reader may
resort to in saying that it is extremely important to make
to these ends subject property, and will be thoroughly dealt
with immediately below. It is necessary and appropriate to
introduce, at this point, the different extent of state control
social sovereignty into the area applicable to state historical
to the world's economy.

2. The Open Sea.

The open sea comprises all the water surface of
the globe which is unincorporated, from a geographical standpoint,
in the globe's general system of water; and which is
international without navigation and planning; and which do
not fall within the category of "national waters," "territorial
waters," or other restricted zones claimed by states adjacent
to the open sea and recognized as such by other
nations of the world. For example, the area of the
territory of the United States is the United States cannot
be classified as open sea. The Chesapeake Bay, although
navigable from the Atlantic, falls within the category of
"national waters" as an historic bay and does not pass
of the open sea.

The principle of freedom of the sea, as an axiom
from antiquity, always from the first has been the basis of
international law, and has been claimed as such by all

world's oceans.⁵⁸ Freedom of the seas was most successfully urged by Hugo Grotius in his thesis "On the Freedom of the Seas,"⁵⁹ first published in 1633. His basic proposition, one which is now universally recognized--in principle at least--declared that "that which cannot be occupied or which has never been occupied can be no one's property and that which is constituted in such a manner that although serving one person, it still suffices for the common use . . . ought to remain in perpetuity in the same condition (regarding its property right states) as when it was first created by nature."⁶⁰

Although Grotius' proposition might be considered as making the seas a "no-man's-land" respecting the jurisdiction of states, this is not accurate. Basically, "freedom of the seas" means that no single nation or group of nations can restrict the use of the high seas to specified participant states ~~for~~ for particular uses by legislative fiat or force of arms. Nevertheless, the sea is subject to the Law of Nations as the rule prohibiting exercise of sovereignty demonstrates.⁶¹ The United States throughout her history

⁵⁸Oppenheim-Lauterpacht, op. cit., p. 582 et seq.

⁵⁹H. Grotius, On the Freedom of the Seas (R. Magoffin transl., New York: Oxford Univ. Press, 1916).

⁶⁰Id., p. 27.

⁶¹Oppenheim-Lauterpacht, supra note 51, at 589-90.

world's second, ⁵⁰ freedom of the press was more successfully
 reaped by Negro colonies in this effort for the freedom of the
 press, ⁵¹ first published in 1853. The basic principle
 was which is now universally recognized--in principle at
 least--declared that "the right of the people to know
 has never been secured and is no one's property; and that
 which is considered as such a matter that although secured
 one person, it will continue for the common use
 to remain in perpetuity in the same condition (provision for
 property right) as when it was first secured by
 nature." ⁵²

Although modern, progressive, and so continued as
 being the same a "modern-day" freedom of the press
 of words, such as not to be
 word, means that no single person or group of persons can
 control the use of the right word to be published or
 others for political uses by legislative act or word
 of law. Therefore, the act is subject to the law of
 nations as the sole controlling authority of government
 government, ⁵³ the United States Government and (greatly

⁵⁰ *Encyclopedia Britannica*, 11th ed., 1911, p. 211.
⁵¹ *Encyclopedia Britannica*, 11th ed., 1911, p. 211.
⁵² *Encyclopedia Britannica*, 11th ed., 1911, p. 211.
⁵³ *Encyclopedia Britannica*, 11th ed., 1911, p. 211.

has always maintained, with one exception,⁶² freedom of the open seas for fishing, commerce, and navigation.

The Convention on the High Seas, adopted by the Geneva Conference on the Law of the Sea in 1958,⁶³ specified four activities in which all states may engage without interference or restriction by other states. These four "freedoms," as they are called, include: navigation; fishing; laying

⁶²This one exception occurred in an effort by the United States to prevent the pelagic sealers from exterminating the great herds of fur-bearing seals. By the efforts to acquire these pelts beyond United States jurisdiction, Canadian and British sealers were slaughtering the herds at sea as they approached their breeding grounds in the Pribilof Islands. The herds estimated at 4 million dwindled to 100,000 by 1910, immediately prior to the North Pacific Sealing Convention. In 1886, the United States claimed virtual complete jurisdiction over a vast area of the North Pacific Ocean extending south from its Alaskan territory, and proceeded to seize foreign sealing vessels in an effort to save the seals. A few years prior to this, when Alaska was part of the Russian Empire, the United States and Great Britain had vigorously objected to similar attempts at oceanic jurisdiction in the same area by Russia, who desired it for security and exclusive fishing purposes. (See T. A. Bailey, supra note 3, at 410 et. seq.) The United States jurisdictional claims were submitted to arbitration where they were defeated in favor of the principle of freedom of the seas. The seals were ultimately saved by means both diplomatic and legislative. (See Oppenheim-Lauterpacht; supra note 51, at 620 et. seq.)

⁶³Adopted by the Conference on April 27, 1958, U.N.W. Doc. A/CONF. 13/L. 53 and correction 1. (See U.S. Naval War College, supra note 32, app. B, at 203 et. seq.)

has always maintained, with one exception,¹⁸ a record of 100 percent accuracy.

[illegible]

The Convention on the 13th June, adopted by the General

Conference on the Law of the Sea in 1958,²³ applied four

activities in which all workers may engage without special

license or restricted by other means. These shall be

as they are called, include: navigation; fishing;

52 This one exception occurred in an effort by the United States to prevent the Pacific states from introducing the great birds of the Pacific north. By the efforts to exclude these birds beyond United States jurisdiction, the United States were also excluding the birds as was an early agreement. Their breeding grounds in the Pacific Islands. The birds are now at a million dollars to 100,000 to 150,000, immediately prior to the North Pacific Sealing Convention. In 1886, the United States signed a treaty with Japan. In 1886, a week after the North Pacific Sealing Convention, the United States signed a treaty with Japan. The treaty was signed in 1886, and succeeded in 1886. A foreign sealing vessel is an effort to save the seals. A few years prior to this, when Alaska was part of the Russian Empire, the United States and other states had attempted to object to similar attempts at sealing jurisdiction in the area. The United States, who desired to be powerful and exclusive in the Pacific, was not willing to do so. (See U. S. Navy, 1886, at 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 87

submarine cables and pipelines, and overflight.⁶⁴ As this Convention implies, the high seas are subject to the jurisdiction of states in some forms

With some variations, jurisdiction on the open seas is based on the maritime flag and therefore the law of the state is applicable to and enforceable against the vessels, persons, and property sailing under that state's maritime flag while they are navigating the high seas.⁶⁵ While on the high seas private vessels are treated as though they are floating portions of the flag state, as long as they remain under the exclusive jurisdiction and control of the flag state.⁶⁶ Thus crimes committed aboard such vessels; births, deaths, marriages, and contracts entered into, while such vessels are on the high seas, are subject to the laws of the flag state.

⁶⁴ Convention on the High Seas, art. 2. See note 63 supra. See also McDougal and Burke, supra note 53, at 751 et seq., and at 84, note 188, where examples of other freedoms of the seas such as the right to use the oceans for military maneuvers and the testing of various weapons are cited to point out that the "four freedoms" cited in the Convention are too restrictive to be a complete listing recognized as generally applicable international law. Since the freedoms of the high seas include any uses which do not interfere unreasonably with the rights of others to use the same seas for the same or other purposes, it is reasonable to assume that intelligence-gathering by vessels in the open seas must be regarded as acceptable conduct under the doctrines of the international law of the sea.

⁶⁵ Oppenheim-Lauterpacht, supra note 51, at 594.

⁶⁶ Id., at 597.

automatic cables and pipelines, and overlying.⁶⁴ as this
Convention implies, the high seas are subject to the prin-
ciple of freedom in some form.

With some variations, jurisdiction on the open seas is
based on the maritime flag and therefore the law of the state
is applicable to and enforceable against the vessels, persons,
and property sailing under that state's maritime flag while
they are navigating the high seas.⁶⁵ While on the high seas
private vessels are treated as though they are flying por-
tions of the flag state, as long as they remain under the ex-
clusive jurisdiction and control of the flag state.⁶⁶ Some
states demand that such vessels; persons, vessels, and
goods, and contracts entered into, while such vessels are on
the high seas, are subject to the laws of the flag state.

⁶⁴ Convention on the High Seas, art. 2. See note 63
above. See also United Nations, Yearbook of International Law,
vol. 1, at 100, note 188, where examples of other
forms of the sea such as the right to use the ocean for
military purposes and the carrying of various weapons and
other articles are mentioned. "Four freedoms" cited in the
Convention are not restricted to the four freedoms listed.
Recognized as generally applicable international law.
Since the freedom of the high seas includes any area which
is not subject to sovereignty with the right to utilize the
sea for the purpose of other purposes, it is
reasonable to assume that jurisdiction is vested in the
state in the open seas where no other state has jurisdiction.
Under the doctrine of the international law of the sea.

⁶⁵ United Nations, Yearbook of International Law, vol. 1, at 100.

⁶⁶ Id., at 101.

In addition, every maritime state, by customary international law, may punish pirates and seize their vessels, wherever found, although they must receive a trial in and according to the laws of the capturing state.⁶⁷ Warships of all countries have certain rights to pursue and search foreign merchant ships on the high seas in addition to the rights to suppress piracy and slave trade.⁶⁸ Although seizure for piracy is permitted by the Convention on the High Seas⁶⁹ it may only be carried out by warships, military aircraft, or other ships or aircraft on government service expressly authorized to do so.⁷⁰

The Law of Nations has customarily characterized men-of-war and other public vessels of states as floating portions of the flag state, whether on the high seas or in foreign territorial waters.⁷¹ Article 8(1) of the Convention on the High Seas specifically exempts warships from the jurisdiction of any state other than its flag state.⁷² In section 2 of the same Article a warship is defined as

⁶⁷Oppenheim-Lauterpacht, supra note 51, at 616.

⁶⁸Id., at 594 et seq. See also Convention on the High Seas, art. 13.

⁶⁹U.S. Naval War College, supra note 32 at 206-08, arts. 14-21.

⁷⁰Id., at 208, art. 21.

⁷¹Oppenheim-Lauterpacht, supra note 51, at 597.

⁷²U.S. Naval War College, supra note 32, at 205.

In addition, every nation state, by necessity, interferes with the national law, may punish pirates and seize their vessels, wherever found, although they must receive a trial in and according to the laws of the capturing state.⁶⁷ Nations of all countries have certain rights to pursue and arrest foreign merchant ships on the high seas in addition to the rights to suppress piracy and slave trade.⁶⁸ Although serious for piracy is permitted by the Convention on the High Seas⁶⁹ it may only be carried out by warships, military aircraft, or other ships or aircraft on government service expressly authorized to do so.⁷⁰

The law of nations has customarily characterized war-of-war and other public vessels of states as floating portions of the flag state, whether on the high seas or in foreign territorial waters.⁷¹ Article 8(1) of the Convention on the High Seas specifically exempts warships from the jurisdiction of any state other than the flag state.⁷² In section 1 of the same article a warship is defined as

⁶⁷ *Opinio iuris*, *supra* note 21, at 618.

⁶⁸ *Id.*, at 594 *et seq.* See also Convention on the High Seas, art. 11.

⁶⁹ *U.S. Naval War College, Legal Notes 11 at 201-02, 1958, 14-21.*

⁷⁰ *Id.*, at 204 *et seq.*

⁷¹ *Opinio iuris*, *supra* note 21, at 607.

⁷² *U.S. Naval War College, Legal Notes 11, at 201.*

"a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears on the Navy list, and manned by a crew who are under regular naval discipline."⁷³

3. Jurisdictional Claims to "Effective Control" by States over Seas Adjacent to Their Territory.

In the case of a nation-state whose territory abuts on the open seas, its jurisdictional authority can be divided into three classifications: internal waters, mentioned above; territorial waters; and contiguous zones.

The internal waters of a state consist--besides inland lakes and rivers navigable to the sea--of harbors and bays; inlets or gulfs which are surrounded by the land of one state and the mouth of which is less than ten miles in width;⁷⁴ or is landward of the base line drawn across the mouth of the bay and conforming with the provisions of the Convention on the Territorial Seas and Contiguous Zone;⁷⁵ or which can be classified as an historic bay.⁷⁶ These areas of jurisdiction

⁷³U.S. Naval War College, supra note 32, at 205.

⁷⁴Oppenheim-Lauterpacht, supra note 51, at 460 and 505-08.

⁷⁵U.S. Naval War College, supra note 32, at 194-96. Note Article 7 of the Convention on the Territorial Seas and the Contiguous Zone, app. A. [Hereinafter cited as "The Convention."]

⁷⁶Oppenheim-Lauterpacht, supra note 51, at 506.

"a ship belonging to the naval forces of a State conducting the official marine hydrographic surveying of its territory, under the command of an officer duly commissioned by the government and whose name appears on the navy list, and manned by a crew who are under regular naval discipline."

2. Jurisdictional status as "fishery vessel" by states over their territory.

In the case of a nation-state whose territory extends to the open sea, the jurisdictional authority can be divided into three classifications: internal waters, territorial waters, and contiguous zones.

The internal waters of a state consist—besides inland lakes and rivers navigable to the sea—as harbors and bays, inlets or gulfs which are surrounded by the land of one state and the mouth of which is less than ten miles in width,⁷⁴ or is narrower by one half the length across the mouth of the bay and conforms with the provisions of the convention on the Territorial Sea and Contiguous Zone,⁷⁵ or which can be classified as an historic bay.⁷⁶ These types of jurisdiction

⁷⁴U.S. Navy War College, op. cit. p. 122.

⁷⁵Convention on the Territorial Sea and Contiguous Zone, 1958, 10 U.S.T. 1240.

⁷⁶U.S. Navy War College, op. cit. pp. 122-123. Article 7 of the Convention on the Territorial Sea and Contiguous Zone, 1958, 10 U.S.T. 1240, states that "historic bays shall be determined by the States concerned."

⁷⁷Convention on the Territorial Sea and Contiguous Zone, 1958, 10 U.S.T. 1240.

are also referred to as national waters. Within these waters the state government has authority equal to that which it enjoys on land--with exceptions so few and minor as to be beyond the scope of this paper.

States littoral to international bodies of water exercise sovereignty over a strip of the seas extending from base lines along their coast out into the oceans for a determined number of miles. The width of the zone varies with the claims of each state, which is free within certain limits to determine the extent of its own jurisdiction. Usually this imaginary boundary (a "base line") follows the low water mark of the sea along the littoral states' shores.⁷⁷ The Convention permits an alternate means of determining the line of origin from which this zone is measured, called the "straight base line method," which was first given international legal recognition by the International Court of Justice in the Anglo-Norwegian fisheries case.⁷⁸ This strip of the seas, actually an integral part of the ocean itself, referred to as the maritime belt or territorial waters,⁷⁹ is measured in miles from the low water mark or the base line. The maximum extent of this strip is an

⁷⁷Oppenheim-Lauterpacht, supra note 51, at 506.

⁷⁸U.S. Naval War College, supra note 32 at 194, arts. 4, 5 (app. A). See n. 80 infra.

⁷⁹Oppenheim-Lauterpacht, supra note 51, at 487.

are also referred to as national waters. Within these waters the state government has authority equal to that which it enjoys on land--with exceptions as to land and mines as to be beyond the scope of this paper.

States littoral to international bodies of water exercise sovereignty over a strip of the sea extending from their flag along their coast out into the ocean for a distance known as miles. The strip of the zone varies with the claim of each state, which is fixed within certain limits by definition on account of its own jurisdiction. Usually this measure is one day's "base line" defined the low water mark of the land along the littoral states' shores.⁷⁷ The common practice of approximate means of determining the line of origin from which this zone is measured, called the "straight base line method," which was first given international level recognition by the International Court of Justice in the Anglo-Norwegian Fisheries Case.⁷⁸ This strip of the zone, usually an integral part of the zone itself, referred to as the maritime belt or belt-social waters,⁷⁹ is measured in miles from the low water mark on the base line. The distance actual of this zone is an

⁷⁷Oppenheim-Lauterpacht, op. cit. pp. 41, 42, 43.

⁷⁸U.S. Naval War College, op. cit. pp. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

⁷⁹Oppenheim-Lauterpacht, op. cit. pp. 41, 42, 43.

imaginary line, every point of which is parallel to its point of origin measured in miles claimed by the littoral state as the extent of its territorial seas' jurisdiction with the acquiescence of the other members of the community of nations. Hence, the extent of a state's territorial waters' jurisdiction will often be referred to as "three-mile limit," twelve-mile limit," and the like. The International Court of Justice appears to say, however, that claims to territorial seas sovereignty exceeding twelve miles are invalid.⁸⁰

A. Historical Development of the Jurisdictional Claims to Adjacent Seas.

The concept of territorial jurisdictional claims to the waters adjacent to states littoral to the world's oceans can be seen as a parallel development to the concept of freedom of the seas. As the Middle Ages drew to a close and the European Nation-states began to emerge, international trade became significant. First, the great trading cities and later, the seafaring states, attempted to maintain their

⁸⁰Dicta in The Anglo-Norwegian Fisheries Case (1951 U.C.J. Reports 116). Herein the International Court of Justice accepted as conforming to international law Norway's method of drawing base lines along the seaward side of the archipelago which ran parallel to northwestern coast from which she measured her territorial waters. The result was to extend to the waters on the landward side of this archipelago Norway's regime of internal waters, which was previously considered, by Great Britain at least, to be open seas. The Convention recognized this system in its provisions (arts. 4, 5).

profitable monopolies by laying claim to vast areas of the world's seas and oceans. Venice laid claim to the entire Adriatic Sea in 1269 as being within her exclusive jurisdiction, exacting tolls from all foreign ships which plied its waters.⁸¹ The trading cities of Genoa and Pisa likewise laid claim to the Ligurian Sea.⁸² To the North, the Kingdoms of Denmark and Sweden divided the Baltic between them, while England claimed sovereignty over the entire English Channel as well as to a substantial area of the North Sea.⁸³

In the fifteenth century a dispute arose between the then preeminent maritime nations, Spain and Portugal, as to which parts of the world were to belong to each exclusively for exploration, colonization, and trade. It was at this time that the European monarchs were consolidating their power, and political entities known as states were becoming fully established. Also at this time the development of water-borne transport had reached a point where long sea voyages became a reality for trade and exploration and so made the sea a principal means of travel and trade. Settlement of this dispute between these two powers was attempted through the efforts of the Papacy when Alexander VI, in his papal bull "Inter Caestus," divided the world between them.

⁸¹C. Bynkershoek, De Domino Maris Dissertatio (R. Magoffin transl., New York: Oxford Univ. Press, 1923), p. 15.

⁸²O. Svarlien, Introduction to the Law of Nations (New York: McGraw-Hill, Inc., 1955), p. 185; ⁸³Id.

protection monopolies by laying claim to vast areas of the world's seas and oceans. Sweden laid claim to the entire Atlantic Sea in 1700 as being within her exclusive jurisdiction, excluding all other nations from all foreign ships which sailed its waters.⁶¹ The trading office of Denmark and also London laid claim to the Indian Sea.⁶² To the Dutch, the Kingdoms of Denmark and Sweden divided the Baltic between them, while England claimed sovereignty over the entire English Channel as well as a substantial area of the North Sea.⁶³

In the fifteenth century a dispute arose between the then government and the nation, Spain and Portugal, as to which parts of the world were to belong to each exclusively for exploration, colonization, and trade. It was at this time that the European monarchs were consolidating their power, and political entities known as states were becoming fully established. Also at this time the development of sea-borne transport had reached a point where long sea voyages became a reality for trade and exploration and as such the sea was a principal source of revenue and power. Part of this dispute between these two powers was arranged through the efforts of the Pope who drew them to his papal seat in Rome, Italy, to settle the world between them.

⁶¹ *Swedish Monarchy, A History of the Kingdom of Sweden* by J. G. Smith, London, 1880, p. 10.

⁶² *History of the Netherlands, 1569-1648* by J. G. Smith, London, 1880, p. 10.

The Western Hemisphere, with the exception of Brazil, was given to Spain. Portugal was to have for its bailiwick those hitherto unexplored and uncolonized regions of the Eastern Hemisphere.⁸⁴ Based upon this document, Spain claimed exclusive use of the central Atlantic Ocean within which her trade routes to the New World passed. Portugal claimed a monopoly over trade with lands washed by the Indian Ocean and the islands in the Western Pacific.

England disputed Spanish claims to the New World and exclusive use of the "Spanish Main," an issue virtually decided with the destruction of Spain's Armada in 1588, while the United Netherlands fought the monopolistic claims of Portugal which conflicted with their trade with Ceylon, the Celebes Islands, and the Western Moluccas through the Dutch East India Company. For this reason Grotius published his famous dissertation "On the Freedom of the Seas."⁸⁵

Bynkershoek, writing about eighty years after Grotius,

⁸⁴O. Svarlien, Introduction to the Law of Nations, p. 185, and Bynkershoek, op. cit., p. 15

⁸⁵Grotius, supra note 59, at 7. See also A. G. Reppy, "The Grotian Doctrine of Freedom of the Seas Reappraised," 19 Fordham L. Rev., (1950), p. 243 et seq. for an excellent historical background from which originated the Grotian doctrines regarding the uses of the high seas. Mr. Reppy demonstrates that not only were the theses of Grotius never wholly accepted regarding freedom of the seas but that, with the emerging uses of the seabed, subsoil, and vertical column of the world's oceans, the Grotian doctrines will become further restricted in their scope and applicability by the practice of the states of the world.

did not agree with his predecessor that the seas were completely open and incapable of occupation and ownership, but rather that they were capable of being made subject to a state's jurisdiction. He cited the case of the Mediterranean Sea in the days of a thriving Roman Empire to demonstrate that even a vast body of water could become a Mare Clausam where the dominion over the surrounding land masses coupled with uncontested occupation by powerful fleets could reduce an ocean to the possession of a single state.⁸⁶ Since ownership of the sea requires permanent occupation and exclusive, uncontested control together with the intent to own and occupy the sea, it was necessary to occupy and control the opposing land masses adjacent to the sea. Since the land adjacent to the seas represented a significant aspect of occupation of the seas, Bynkershoek concluded that some area of the open seas could be reduced to the sovereignty of the littoral state because its territory abutted the sea--even though the sea was incapable of being occupied by one state.⁸⁷ And granting the impossibility to control a vast ocean, he concluded that a lesser part of the sea could be controlled by a single state.

As early as the beginning of the seventeenth century the concept that a state could claim exclusive jurisdiction over the seas adjacent to the land mass of the state itself

⁸⁶ Bynkershoek, supra note 81, at 49; ⁸⁷ Id., at 43.

did not agree with his predecessor that the same was not
 possible when not incapable of occupation and ownership, but
 rather that they were capable of being made subject to a state's
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 dominion over the surrounding land states coupled with uncom-
 pleted occupation by powerful fleets could reduce an owner to
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 the territory situated the sea-ways through the sea and the
 capable of being occupied by one state.⁶⁷ And granting the
 impossibility to control a vast ocean, he maintained that a
 lesser part of the sea could be controlled by a single state.
 As to the question of the sovereignty of the sea,
 the court said a state could claim exclusive jurisdiction
 over the sea adjacent to the land area of the state itself.

⁶⁶ *Goldschmidt v. Goldschmidt*, 101 N.Y. 211, 212 (1892).

was promulgated. The distances claimed varied from 100 miles (Bodin) or 60 miles (Selden) to the limit of vision.⁸⁸ These were discussed and refuted by Bynkershoek.

Bynkershoek concluded that the proper and most reasonable delimitation should be based on the regulations for rendering honors adopted by the Estates for the Belgic Confederation which had decreed, in 1671, that foreign princes were to be saluted when their ships reached the point to which their cities' cannon could carry. The author concluded that control of the land over the sea should be no further than permanent, forceful control could be exercised.⁸⁹ This doctrine has since become known as "the cannon shot rule" and is generally accepted by the Western Maritime Powers and Japan as the three-mile limit.

The Scandanavian States never accepted "the cannon shot rule," but they contributed to the present law of the sea by developing the concept of a maritime belt. After Greenland was rediscovered in the seventeenth century the King of Denmark claimed a Mare Clausam, extending through the Northern Atlantic between Greenland and Norway and Denmark. Danish licenses to fish in these waters always excepted a belt of water around the Danish possessions there--Iceland and the Faeroe Islands.⁹⁰

⁸⁸ Bynkershoek, supra note 81, at 43.

⁸⁹ Id., at 44. But see M. W. Mouton, The Continental Shelf, p. 192 et seq., where he alleges that "the cannon shot rule" never existed.

⁹⁰ H. S. Kent, The Historical Origins of the Three Mile Limit, 48 A.J.I.L. (1954), p. 537 et seq.

These maritime belts varied in width throughout the seventeenth and eighteenth centuries, as Denmark considered necessary for effective enforcement, but were fixed at four leagues during the reign of Christian V in 1682 where they remained until 1836.

These Danish maritime belts were likewise used as neutrality zones during the various wars of this era between France, England, and Holland. France attempted to obtain Danish and Swedish recognition of a three-mile limit as it was the probable maximum range of cannon. This was never specifically accepted. Gradually, a one-league neutrality zone became the acknowledged limit along the Danish coasts.

During the Seven Years War between France and England, Sweden adopted (1758) a three-mile neutrality zone in which no hostilities of any kind were permitted.⁹¹ This distance, probably adopted in deference to France, was increased to four miles in 1779 to conform with the Danish neutrality belt. In 1836 a Danish ordinance adjusted the fishing zone to one marine league around the coast of Iceland.

It was during the early nineteenth century that "the cannon shot rule," advocated by France, and the concept of the maritime belt, used by the Scandinavian countries, melded into the modern conception of a three-mile belt of territorial seas as we understand it today.

⁹¹H. S. Kent, "The Historical Origins of the Three Mile Limit," 48 A.J.I.L. (1954), p. 550.

These maritime policies varied in width throughout the seven-
teenth and eighteenth centuries, as Denmark considered necessary
for effective enforcement, but were linked to four leading theories
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trality some during the various parts of this war between
France, England, and Holland. France attempted to obtain
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During the Seven Years War between France and England,
Sweden adopted (1756) a three-mile neutrality zone in which no
hostilities of any kind were permitted.⁹¹ This distance, prop-
erly adopted in reference to France, was intended to down-
size in 1779 to conform with the Danish neutrality zone. In
1800 a similar maritime adjustment was made from 1800
within league across the coast of Iceland.

It was during the early nineteenth century that the
three-mile rule, recognized by Sweden, and the concept of
the maritime belt, used by the international community, merged
into the modern conception of a three-mile belt of territorial
waters as we understand it today.

⁹¹ Cf. *Journal of the Historical Association*, 1900, p. 240.
Lund, 1900, p. 240.

B. Modern Claims to Broader Jurisdiction Over the Territorial Seas

The three-mile limit was never universally recognized but the matter lost its significance as long as the seas were open and relative peace reigned in Europe--as it did through most of the nineteenth century. In 1909, Imperial Russia adopted a twelve-mile limit in order to protect her fishing interests and her security along her Pacific Ocean seacoasts. Great Britain and Japan refused to recognize the jurisdictional extension.⁹² The Union of Soviet Socialist Republics has continued to maintain a twelve-mile limit as the extent of her territorial waters jurisdiction.⁹³

In 1930 the Hague Codification Conference,⁹⁴ attended by forty-seven states and the then free city of Danzig, attempted to establish, by Convention, a universal width of the maritime belt. No agreement or compromise could be reached. At that time the disputants argued between a six-mile limit versus a three-mile limit. The principal advocates of the former included Italy, Spain, Brazil, Persia, Roumania, Turkey, and Yugoslavia; those states urging the latter limit included Great Britain and her Dominions, the United States, France, Germany, Japan, Belgium, China, Holland, and Poland.⁹⁵

⁹²Colombos, The International Law of the Sea (5th ed., 1963), p. 78.

⁹³U.S. Naval War College, supra note 32, at 285.

⁹⁴Id., at 1, Note 2.

⁹⁵Oppenheim-Lauterpacht, supra note 51, at 491, Note 2.

A. Modern Claims to Extended Jurisdiction
Over the Territorial Sea

The three-mile limit was never universally recognized but the latter lost its significance as long as the seas were open and isolative peace reigned in Europe--as it did through most of the nineteenth century. In 1909, Imperial Germany adopted a twelve-mile limit in order to protect her fishing interests and her security along her Baltic Ocean coasts. Great Britain and Japan refused to recognize the jurisdiction extension.⁵² The Union of Soviet Socialist Republics has continued to maintain a twelve-mile limit as the extent of her territorial waters jurisdiction.⁵³

In 1930 the League of Nations Conference,⁵⁴ attended by forty-seven states and the four river city of Geneva, attempted to establish, by convention, a universal limit of the territorial sea. An agreement or compromise could be reached. At this time the dispute arose between a six-mile limit versus a twelve-mile limit. The principal opponents of the former included Italy, Spain, Brazil, Japan, Germany, France, and Yugoslavia; these states during the latter limit included Great Britain and her Dominion, the United States, Sweden, Germany, Japan, Belgium, China, Holland, and Poland.⁵⁵

⁵²Colman, The International Law of the Sea (1909) 201.
1903, p. 16.

⁵³U.S. Navy and Marine Corps, Naval Laws of the U.S.

⁵⁴U.S. Navy and Marine Corps, Naval Laws of the U.S.

⁵⁵Colman, The International Law of the Sea (1909) 201.

Twenty-eight years later, in 1958, the United Nations Conference on the Law of the Sea was convened in Geneva, Switzerland, and attended by eighty-six nations.⁹⁶ Although much was done to consolidate the Law of the Sea, (four Conventions were produced at the Conference), a solution to the variegated patterns of maritime belts which were encroaching on the world's seas could not be found. The infant coastal states, former colonies of the European States, frequently claimed a maritime belt of twelve miles--as did the majority of the communist bloc members and a few States of the Middle East. The three-mile limit, as well, maintained a large number of adherents, as did the six-mile maritime belt. Nor did the plethora of claims end here, but various states claimed four, five, nine, and ten-mile territorial seas. Some claims extended to two hundred miles.⁹⁷ North Korea specifically claims a maritime belt of twelve miles.⁹⁸ Not being a member of the United Nations, the People's Democratic Republic of Korea was not represented at the Geneva Conference.

⁹⁶U.S. Naval War College, supra note 32, at 491, Note 2.

⁹⁷Id., at 273 et seq., (app. K). For the extent of territorial seas jurisdiction claimed by various members of the United Nations in 1958.

⁹⁸N.Y. Times, Jan. 24, 1968, at 14, col. 5.

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maritime belt of twelve miles--as did the majority of the
community also members and a few states of the Middle East.

The three-mile limit, as well, retained a large number of

adherents, as did the obsolete maritime belt. Not did the

plethora of claims and non-claims, but various states claimed four,

five, six, and maritime territorial seas. Some claimed ex-

tended to two hundred miles. 37 North Korea specifically claimed

a maritime belt of twelve miles, 38 not being a member of the

United Nations, but People's Democratic Republic of Korea was

not represented at the Geneva Conference.

36 U.S. Navy War College, United Nations Conference on the Law of the Sea, 1958, p. 1.

37 U.S. Navy War College, United Nations Conference on the Law of the Sea, 1958, p. 1. For the extent of territorial waters jurisdiction claimed by various members of the United Nations in 1958.

38 U.S. Navy War College, United Nations Conference on the Law of the Sea, 1958, p. 1.

In the ten years which have elapsed since the Conference, the situation has become even more difficult to solve. Forty-one members of the United Nations claim twelve miles jurisdiction over the seas littoral to their coasts; twenty-three states maintain a three-mile limit; and thirteen states adhere to a six-mile maritime belt. Others claim territorial seas varying from a minimum of four miles to a maximum assertion of two hundred miles.⁹⁹

C. The Meaning of Territorial Seas Jurisdiction

The issue of the breadth of the maritime belt is important. Although there is no unanimity as to the nature of the right to territorial seas jurisdiction, it appears in the practice of states that it is a form of sovereignty rather than a form of riparian rights granted to landholders along a stream or river under the internal law of Common Law countries. It does not appear, however, that the maritime belt can be ceded by the littoral state to another nation,¹⁰⁰ Bynkershoek's opinion to the contrary, being no longer tenable, notwithstanding.¹⁰¹

Universal state practice indicates that the natural resources, including the living resources of the sea, within

⁹⁹W. L. Griffin, The Law of Ocean Space (temp. ed., 1968), p. 72 et seq. See also "National Council on Marine Resources and Engineering Development," Marine Science Affairs (Jan. 1969), app. C-4, p. 248.

¹⁰⁰Oppenheim-Lauterpacht, supra note 51, at 463.

¹⁰¹Bynkershoek, supra note 81, at 5.

In the few years which have elapsed since the Conference, the situation has become even more difficult to solve. Forty-one members of the United Nations claim either direct jurisdiction over the seas littoral to their coasts, twenty-three states maintain a three-mile limit; and thirteen states adhere to a six-mile maritime belt. Other claim territorial seas varying from a minimum of four miles to a maximum assertion of two hundred miles.⁹⁹

C. The Meaning of Territorial Seas Jurisdiction

The scope of the breadth of the maritime belt is important. Although there is no unanimity as to the nature of the right to territorial seas jurisdiction, it appears in the practice of states that it is a form of sovereignty rather than a form of riparian right limited to landlocked states along a stream or river under the internal law of common law countries. It does not appear, however, that the maritime belt can be used by the littoral states to another nation,¹⁰⁰ Symon's theory is applied to the economy, being no longer capable of being used.

Universal state practice indicates that the littoral states, including the States members of the sea, which

⁹⁹W. J. Stewart, The Law of Ocean Rights (New York, 1951), p. 12 et seq. See also "International Council on Marine Resources and Sustaining Management," United Nations Bulletin (Jan. 1954), pp. C-1, p. 250.

¹⁰⁰Symon's theory, op. cit., pp. 12, 13 et seq.

¹⁰¹Symon's theory, op. cit., pp. 12, 13 et seq.

the maritime belt--whether above, on, or beneath the seabed--belong exclusively to the littoral state.¹⁰² The littoral state can control cabotage, intra-national seacoast trade within the territorial sea, and exclude foreign vessels from such activity within those seas.¹⁰³ Within the maritime belt the littoral state exclusively exercises police, sanitary, customs, and navigational authority and control. This control extends from beneath the sea through the air above the maritime belt.¹⁰⁴ For security purposes, among others, the littoral state can establish routes for foreign vessels to take while trans-navigating her territorial waters and prohibit the entrance of those vessels into certain specified areas of the maritime belt.¹⁰⁵ The state may also prescribe by laws and regulations maritime ceremonies to be followed by foreign vessels while using her territorial seas.¹⁰⁶

As extensive as is this jurisdiction it is limited in important respects which distinguish it from the regime of internal waters. Customary international law entitles all foreign merchant vessels the right, in peacetime, to navigate territorial seas of all states as long as that passage is inoffensive to the littoral state.¹⁰⁷ Although the right to grant similar passage was not generally recognized in international law regarding foreign men-of-war, usage of nations

¹⁰²Oppenheim-Lauterpacht, supra note 51, at 492.

¹⁰³Id., at 493; ¹⁰⁴Id., at 487 et seq.; ¹⁰⁵Id., at 493.

¹⁰⁶Id., at 493; ¹⁰⁷Id.

the maritime belt—whether above, on, or beneath the surface—being exclusively to the littoral state.¹⁰⁷ The littoral state can control coastal, intra-national movement from within the territorial sea, and exclude foreign vessels from such activity within those seas.¹⁰⁸ Within the maritime belt the littoral state exclusively exercises rights, authority, ownership, and navigational sovereignty and control. This control extends from beneath the sea through the air above the maritime belt.¹⁰⁹ For security purposes, among others, the littoral state can establish routes for foreign vessels to take while trans-navigating the territorial waters and exercise the entrance of those vessels into certain specified areas of the maritime belt.¹¹⁰ The state may also prescribe its laws and regulations maritime commerce to be followed by foreign vessels while using the territorial sea.¹¹¹

As extensive as is this jurisdiction it is limited in important respects and distinctions exist between the internal waters. Customary international law applies to foreign vessels within the type, in accordance, to navigate territorial areas of all states as long as that passage is innocuous to the littoral state.¹¹² Although the right to grant similar passage was not generally recognized in international law regarding foreign vessels, states of nations

¹⁰⁷Oppenheim International Law, 8th ed. (1955), § 111.

¹⁰⁸Id., at 111; ¹⁰⁹Id., at 112; ¹¹⁰Id., at 113; ¹¹¹Id., at 114.

¹¹²Id., at 115.

generally permitted a similar freedom to warships in peacetime as long as the passage was in no way harmful or offensive to the littoral state.¹⁰⁸ However many international law scholars, among them Elihu Root and W. E. Hall, maintained that because war vessels by their very nature threaten, they have no right of innocent passage.¹⁰⁹

In 1949 the International Court of Justice decided the Corfu Channel case.¹¹⁰ It determined that international straits were open to transnavigation by foreign men-of-war in time of peace as long as that passage was innocent, and that no prior notification by the vessel's flag state was required before the transnavigation since such activity was granted under international law.

The Convention on the Territorial Seas and the Contiguous Zone, Section III,¹¹¹ "codifies" the right of innocent passage,¹¹² the decision in the Corfu Channel case,¹¹³ and defines

¹⁰⁸Oppenheim-Lauterpacht, supra note 51, at 494.

¹⁰⁹Svarlien, supra note 82, at 195.

¹¹⁰The Corfu Channel Case (1949), I.C.J. Reports 4. See also U.S. Naval War College, International Law Documents 1948-1949, p. 109 et seq.

¹¹¹U.S. Naval War College, supra note 32, at 197-200.

¹¹²Id., at 197-98, art. 14;

¹¹³Id., at 198, arts. 15 & 16(4).

generally permitted a similar freedom of passage in peacetime as long as the passage was in no way harmful or offensive to the coastal state.¹⁰⁰ However many international law scholars, among them Elmhurst and W. E. Hall, maintained that belligerent war vessels by their very nature threaten, they have no right of innocent passage.¹⁰¹

In 1919 the International Court of Justice decided the *Cornwallis* case.¹⁰² It determined that international waters were open to transshipment by foreign men-of-war in time of peace as long as that passage was innocent, and that no prior notification by the vessel's flag state was required before the transshipment since such activity was permitted under international law.

The Convention on the Territorial Sea and the Contiguous Zone, Article 13,¹⁰³ modified the right of innocent passage, the decision in the *Cornwallis* case,¹⁰⁴ and defined

¹⁰⁰ *Continental Shelf*, supra note 31, at 442.

¹⁰¹ *Continental Shelf*, supra note 31, at 442.

¹⁰² *The Cornwallis* Case, 1919, 1 U.S. Reports 404. See also U.S. Naval War College, *International Law* (1919), 1919, p. 103 et seq.

¹⁰³ U.S. Naval War College, *Supra* note 31, at 107-108.

¹⁰⁴ *Continental Shelf*, supra note 31.

¹⁰⁵ *Continental Shelf*, supra note 31, at 442.

the rights and duties of both the littoral state¹¹⁴ and the foreign vessel while navigating territorial seas, including international straits.¹¹⁵

The final distinction between the sovereignty of a coastal state within its territory as opposed to that which it exercises over its maritime belt, which bears mentioning here, is the matter of jurisdiction over vessels navigating through its belt. International law has virtually left a void in this area. Some states, such as the United Kingdom, have exercised jurisdiction by means of the Territorial Waters Jurisdiction Act of 1878,¹¹⁶ whereas many writers believe that this is an improper exercise of jurisdiction.¹¹⁷ The rule may be different, however, when the foreign merchant vessel casts anchor in the territorial seas,¹¹⁸ and state practice varies.

The Convention limits jurisdictional exercise over foreign merchant vessels in the territorial seas to four categories: if the crime committed aboard the merchant vessel extends to the coastal state; if the crime tends to disturb

¹¹⁴U.S. Naval War College, supra note 32, at 198-200, arts. 15, 16, 18, 19, 20 & 23.

¹¹⁵Id., at 197-200, arts. 14, 17, 19, 21, 22 & 23.

¹¹⁶Oppenheim-Lauterpacht, supra note 51, at 47.

¹¹⁷Id., at 495; ¹¹⁸Id., at 503.

the right and action of both the littoral states and the foreign vessel while navigating territorial seas, including international waters.¹¹²

The final distinction between the sovereignty of a coastal state within its territory as opposed to that which it exercises over its territorial belt, which bears resemblance here, is the matter of jurisdiction over vessels navigating through the belt. International law has virtually left a void in this area. Some states, such as the United Kingdom,

have extended jurisdiction by means of the Territorial Waters Jurisdiction Act of 1876,¹¹³ whereas many states believe that this is an improper exercise of jurisdiction.¹¹⁴ The rule may be different, however, when the foreign vessel carries cargo which is the territorial sea,¹¹⁵ and where practice varies.

The Commission states jurisdictional questions over foreign merchant vessels in the territorial sea to four categories: (1) the right of coastal states to regulate and enforce in the coastal waters of one state vessels of another

¹¹²U.S. Naval War College, *Naval Law*, 37, 38 (1910-1911).
¹¹³U.S. Naval War College, *Naval Law*, 37, 38 (1910-1911).

¹¹⁴U.S. Naval War College, *Naval Law*, 37, 38 (1910-1911).

¹¹⁵U.S. Naval War College, *Naval Law*, 37, 38 (1910-1911).

¹¹⁶U.S. Naval War College, *Naval Law*, 37, 38 (1910-1911).

the peace and tranquility of the coastal state; if the captain of the vessel or the consul of the flag state requests the coastal state for assistance, and if such exercise of jurisdiction is necessary to stop illicit traffic in drugs.¹¹⁹

Under international law a foreign warship is always considered to be a floating portion of the flag state, similar to a diplomatic mission, even though in foreign waters and never may she become subject to a coastal state's jurisdiction. Nor may an official of the littoral state board her without special permission.¹²⁰ Crimes committed on board the vessel by persons in the service of the vessel are subject to the exclusive jurisdiction of the flag state of the vessel. Even if a citizen of the littoral state commits a crime aboard the vessel, the flag state of the vessel may require he be brought to the flag state for prosecution.¹²¹

On the other hand . . . unless special international agreements, or special treaties between the flag state and the littoral state, provide to the contrary in regard to a particular port or to certain territorial waters, a State is, in strict law, always competent to exclude men-of-war from all or certain of its ports, and, according to some, from those territorial waters which do not serve as highways for international traffic.¹²²

¹¹⁹U.S. Naval War College, supra note 32, at 199, art. 19(1).

¹²⁰Oppenheim-Lauterpacht, supra note 51, at 853-885. See also J. L. Brierly, The Law of Nations (6th ed., 1963), p. 267 et seq.

¹²¹Oppenheim-Lauterpacht, op. cit., p. 854.

¹²²Id., at 853.

the power and responsibility of the coastal States; at the request
of the vessel or the owner of the flag State requests the
coastal State for assistance, and at such exercise of jurisdiction
action is necessary to stop illicit traffic in drugs, 119
Under international law a foreign warship is always
considered to be a floating portion of the flag State, similar
to a diplomatic mission, even though it foreign waters and
never may it become subject to a coastal State's jurisdiction.
Nor may an official of the littoral State board her without
special permission. 120 Custom permitted on board the vessel
by persons in the service of the vessel and subject to the
exclusive jurisdiction of the flag State of the vessel. Even
if a citizen of the littoral State commits a crime aboard the
vessel, the flag State of the vessel may require to be brought
to the flag State for prosecution. 121

On the other hand . . . unless special international
agreements, or special treaties between the flag State
and the littoral State, provide to the contrary in
regard to a particular port or to certain particular
waters, a State is, in general law, always competent
to exercise jurisdiction from all or certain of its ports,
and, according to some, from those territorial waters
which do not serve as highways for international
traffic. 122

120-121. United Nations Conference on the Law of the Sea, 1958, at 199, para. 19(1).
122. United Nations Conference on the Law of the Sea, 1958, at 199, para. 19(1).
123. United Nations Conference on the Law of the Sea, 1958, at 199, para. 19(1).
124. United Nations Conference on the Law of the Sea, 1958, at 199, para. 19(1).
125. United Nations Conference on the Law of the Sea, 1958, at 199, para. 19(1).

The Convention adopted these international rules regarding warships, but in recognition of the limited extraterritoriality of these vessels provided a single sanction, as recognized by international law in Article 23:

If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea.¹²³

D. Limited State Claims to Jurisdiction
Beyond the Territorial Waters--
Contiguous Zones

The Convention on the Territorial Sea and the Contiguous Zone recognizes the latter and defines it in Article 24 as "a zone of the high seas contiguous to its territorial sea . . . [which] may not extend beyond twelve miles from the base line from which the breadth of the territorial sea is measured."¹²⁴ In this area the coastal state is authorized to exercise control necessary to prevent infringement of its customs, fiscal, immigration or sanitation regulations within its territory or its territorial sea and to punish those who are responsible for the infringement of such regulations while within its territory or its territorial sea.¹²⁵

The policy of the United States has been that there is a protective jurisdiction which extends beyond the territorial sea for limited purposes, which is necessary to effectively

¹²³ U.S. Naval War College, supra note 32, at 200.

¹²⁴ Id., at 200-01, arts. 24(1) and (2); ¹²⁵ Id.

The Convention adopted these international rules regard-

ing vessels, but in recognition of the limited extrajur-

isdiction of some vessels provided a single sanction, as

recognized by international law in Article 13:

It any vessel does not comply with the regulations
of the coastal State concerning passage through the
territorial sea and disregards any request for stop-
page which is made to it, the coastal State may
require the vessel to leave the territorial sea.¹²³

C. Limited State Claims to Jurisdiction Beyond the Territorial Waters-- Contiguous Zones

The Convention on the Territorial Sea and the Contiguous

Zone recognizes the latter and defines it in Article 24 as the

zone of the sea adjacent to the territorial sea . . .

which may not extend beyond twelve miles from the base line

from which the breadth of the territorial sea is measured.¹²⁴

In this area the coastal State is authorized to exercise

control necessary to prevent infringement of its customs,

tax, immigration or sanitation regulations within its terri-

tory or its territorial sea and to punish those who are

responsible for the infringement of such regulations while

within the territory or its territorial sea.¹²⁵

One policy of the United States has been that there is

a protective jurisdiction which extends beyond the territorial

sea for limited purposes, which is necessary to effectively

¹²³U.S. Great Seal Enclaves, supra note 12, at 207.

¹²⁴Id., at 200-01; supra, note 12, at 197.

enforce the coastal state's territorial sovereignty. The distance has been measured in miles, sailing time, and other methods.¹²⁶ Great Britain and other states have similar provisions.¹²⁷ Such assertions to jurisdiction over the area beyond the territorial sea have been most common in sanitation and customs regulations.

As early as 1799 the United States adopted revenue laws which extended its jurisdiction on the high seas to acts committed within four marine leagues of its coasts.¹²⁸ During its Prohibition Era, the United States claimed the right to stop, search, and seize foreign vessels suspected of smuggling alcoholic beverages into the country although they were beyond four marine leagues from the coast, in order to effectuate the Volstead Act.¹²⁹ Since ships were often stopped even though they were not bound for ports within the United States, many states strongly objected. Ultimately, treaties were concluded with many states which tolerated seizure of vessels within

¹²⁶But see Dickenson, Jurisdiction at the Maritime Frontier, 40 Harv. L. Rev. 1 at 13 (1926) where it was argued that a distance measurement alone is for many purposes impractical in delimitation of the territorial sea.

¹²⁷Oppenheim-Lauterpacht, supra note 51, at 495 & 496.

¹²⁸1 Stat. 627, 647, 700 (1799).

¹²⁹42 Stat. 858, 581 et seq. (1922), The Tariff Act of Sept. 21, 1922.

enforce the coastal state's territorial sovereignty. The distance has been measured in miles, sailing time, and other methods.¹²⁶ Great Britain and other states have similar provisions.¹²⁷ Such assertions to jurisdiction over the seas beyond the territorial sea have been common in tradition and custom regulations.

As early as 1793 the United States adopted revenue laws which extended its jurisdiction on the high seas to acts committed within four marine leagues of its coast.¹²⁸ During its prohibition era, the United States claimed the right to stop, search, and seize foreign vessels suspected of smuggling alcoholic beverages into the country although they were beyond four marine leagues from the coast, in order to eliminate the violation act.¹²⁹ Since ships were often stopped even though they were not bound for ports within the United States, many states strongly objected. Ultimately, treaties were concluded with many states which prohibited seizure of vessels within

¹²⁶ For the discussion, *jurisdiction of the coastal state*, see H. L. H. (1930) where it is stated that a distance measurement alone is not enough to establish jurisdiction of the coastal state.

¹²⁷ *United States v. Smith*, 160 U.S. 146 (1895).

¹²⁸ *United States v. Smith*, 160 U.S. 146 (1895).

¹²⁹ *United States v. Smith*, 160 U.S. 146 (1895).

one hour sailing time from the United States coasts based on the speed of the vessels seized.¹³⁰

Chief Justice Marshall, in 1804, enunciated the principle that the right of self defense of a state's territory permitted a state to exercise jurisdictional rights beyond the immediate territory of the state.¹³¹ In this case the seizure of an American commercial vessel on the high seas by the Portuguese authorities who were protecting the commercial interests of their colony of Brazil was upheld by the United States Supreme Court as a lawful exercise of jurisdiction under international law. This was based on the theory of international law that an unreasonable attempt at extraterritorial jurisdiction would be evidenced by the objections of other nations and that any exercise of defensive jurisdiction not objected to by other states was permissible under the Law of Nations.

Although generally the maximum limit for customs regulation, revenue laws, and claims for exclusive fishing rights has been limited to twelve miles, the Anti-smuggling Act, passed in 1934, authorizes the President of the United States to establish temporary customs enforcement areas which can extend

¹³⁰Oppenheim-Lauterpacht, supra note 51, at 498 & n. 3. Treaties, Great Britain: Jan. 23, 1924; Norway: May 24, 1924; Japan: May 21, 1928.

¹³¹Church v. Hubbard, 6 U.S. (2 Cranch) 187 (1804).

one hour sailing time from the United States coast dated on

the coast of the vessel seized.¹³⁰

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¹³⁰ *Opinion of the Court*, 1804, 1805, 1806, 1807, 1808, 1809, 1810, 1811, 1812, 1813, 1814, 1815, 1816, 1817, 1818, 1819, 1820, 1821, 1822, 1823, 1824, 1825, 1826, 1827, 1828, 1829, 1830, 1831, 1832, 1833, 1834, 1835, 1836, 1837, 1838, 1839, 1840, 1841, 1842, 1843, 1844, 1845, 1846, 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 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2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 2681, 2682, 2683, 2684, 2685, 2686, 2687, 2688, 2689, 2690, 2691, 2692, 2693, 2694, 2695, 2696, 2697, 2698, 2699, 2700, 2701, 2702, 2703, 2704, 2705, 2706, 2707, 2708, 2709, 2710, 2711, 2712, 2713, 2714, 2715, 2716, 2717, 2718, 2719, 2720, 2721, 2722, 2723, 2724, 2725, 2726, 2727, 2728, 2729, 2730, 2731, 2732, 2733, 2734, 2735, 2736, 2737, 2738, 2739, 2740, 2741, 2742, 2743, 2744, 2745, 2746, 2747, 2748, 2749, 2750, 2751, 2752, 2753, 2754, 2755, 2756, 2757, 2758, 2759, 2760, 2761, 2762, 2763, 2764, 2765, 2766, 2767, 2768, 2769, 2770, 2771, 2772, 2773, 2774, 2775, 2776, 2777, 2778, 2779, 2780, 2781, 2782, 2783, 2784, 2785, 2786, 2787, 2788, 2789, 2790, 2791, 2792, 2793, 2794, 2795, 2796, 2797, 2798, 2799, 2800, 2801, 2802, 2803, 2804, 2805, 2806, 2807, 2808, 2809, 2810, 2811, 2812, 2813, 2814, 2815, 2816, 2817, 2818, 2819, 2820, 2821, 2822, 2823, 2824, 2825, 2826, 2827, 2828, 2829, 2830, 2831, 2832, 2833, 2834, 2835, 2836, 2837, 2838, 2839, 2840, 2841, 2842, 2843, 2844, 2845, 2846, 2847, 2848, 2849, 2850, 2851, 2852, 2853, 2854, 2855, 2856, 2857, 2858, 2859, 2860, 2861, 2862, 2863, 2864, 2865, 2866, 2867, 2868, 2869, 2870, 2871, 2872, 2873, 2874, 2875, 2876, 2877, 2878, 2879, 2880, 2881, 2882, 2883, 2884, 2885, 2886, 2887, 2888, 2889, 2890, 2891, 2892, 2893, 2894, 2895, 2896, 2897, 2898, 2899, 2900, 2901, 2902, 2903, 2904, 2905, 2906, 2907, 2908, 2909, 2910, 2911, 2912, 2913, 2914, 2915, 2916, 2917, 2918, 2919, 2920, 2921, 2922, 2923, 2924, 2925, 2926, 2927, 2928, 2929, 2930, 2931, 2932, 2933, 2934, 2935, 2936, 2937, 2938, 2939, 2940, 2941, 2942, 2943, 2944, 2945, 2946, 2947, 2948, 2949, 2950, 2951, 2952, 2953, 2954, 2955, 2956, 2957, 2958, 2959, 2960, 2961, 2962, 2963, 2964, 2965, 2966, 2967, 2968, 2969, 2970, 2971, 2972, 2973, 2974, 2975, 2976, 2977, 2978, 2979, 2980, 2981, 2982, 2983, 2984, 2985, 2986, 2987, 2988, 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024, 3025, 3026, 3027, 3028, 3029, 3030, 3031, 3032, 3033, 3034, 3035, 3036, 3037, 3038, 3039, 3040, 3041, 3042, 3043, 3044, 3045, 3046, 3047, 3048, 3049, 3050, 3051, 3052, 3053, 3054, 3055, 3056, 3057, 3058, 3059, 3060, 3061, 3062, 3063, 3064, 3065, 3066, 3067, 3068, 3069, 3070, 3071, 3072, 3073, 3074, 3075, 3076, 3077, 3078, 3079, 3080, 3081, 3082, 3083, 3084, 3085, 3086, 3087, 3088, 3089, 3090, 3091, 3092, 3093, 3094, 3095, 3096, 3097, 3098, 3099, 3100, 3101, 3102, 3103, 3104, 3105, 3106, 3107, 3108, 3109, 3110, 3111, 3112, 3113, 3114, 3115, 3116, 3117, 3118, 3119, 3120, 3121, 3122, 3123, 3124, 3125, 3126, 3127, 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3294, 3295, 3296, 3297, 3298, 3299, 3300, 3301, 3302, 3303, 3304, 3305, 3306, 3307, 3308, 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317, 3318, 3319, 3320, 3321, 3322, 3323, 3324, 3325, 3326, 3327, 3328, 3329, 3330, 3331, 3332, 3333, 3334, 3335, 3336, 3337, 3338, 3339, 3340, 3341, 3342, 3343, 3344, 3345, 3346, 3347, 3348, 3349, 3350, 3351, 3352, 3353, 3354, 3355, 3356, 3357, 3358, 3359, 3360, 3361, 3362, 3363, 3364, 3365, 3366, 3367, 3368, 3369, 3370, 3371, 3372, 3373, 3374, 3375, 3376, 3377, 3378, 3379, 3380, 3381, 3382, 3383, 3384, 3385, 3386, 3387, 3388, 3389, 3390, 3391, 3392, 3393, 3394, 3395, 3396, 3397, 3398, 3399, 3400, 3401, 3402, 3403, 3404, 3405, 3406, 3407, 3408, 3409, 3410, 3411, 3412, 3413, 3414, 3415, 3416, 3417, 3418, 3419, 3420, 3421, 3422, 3423, 3424, 3425, 3426, 3427, 3428, 3429, 3430, 3431, 3432, 3433, 3434, 3435, 3436, 3437, 3438, 3439, 3440, 3441, 3442, 3443, 3444, 3445, 3446, 3447, 3448, 3449, 3450, 3451, 3452, 3453, 3454, 3455, 3456, 3457, 3458, 3459, 3460, 3461, 3462, 3463, 3464, 3465, 3466, 3467, 3468, 3469, 3470, 3471, 3472, 3473, 3474, 3475, 3476, 3477, 3478, 3479, 3480, 3481, 3482, 3483, 3484, 3485, 3486, 3487, 3488, 3489, 3490, 3491, 3492, 3493, 3494, 3495, 3496, 3497, 3498, 3499, 3500, 3501, 3502, 3503, 3504, 3505, 3506, 3507, 3508, 3509, 3510, 3511, 3512, 3513, 3514, 3515, 3516, 3517, 3518, 3519, 3520, 3521, 3522, 3523, 3524, 3525, 3526, 3527, 3528, 3529, 3530, 3531, 3532, 3533, 3534, 3535, 3536, 3537, 3538, 3539, 3540, 3541, 3542, 3543, 3544, 3545, 3546, 3547, 3548, 3549, 3550, 3551, 3552, 3553, 3554, 3555, 3556, 3557, 3558, 3559, 3560, 3561, 3562, 3563, 3564, 3565, 3566, 3567, 3568, 3569, 3570, 3571, 3572, 3573, 3574, 3575, 3576, 3577, 3578, 3579, 3580, 3581, 3582, 3583, 3584, 3585, 3586, 3587, 3588, 3589, 3590, 3591, 3592, 3593, 3594, 3595, 3596, 3597, 3598, 3599, 3600, 3601, 3602, 3603, 3604, 3605, 3606, 3607, 3608, 3609, 3610, 3611, 3612, 3613, 3614, 3615, 3616, 3617, 3618, 3619, 3620, 3621, 3622, 3623, 3624, 3625, 3626, 3627, 3628, 3629, 3630, 3631, 3632, 3633, 3634, 3635, 3636, 3637, 3638, 3639, 3640, 3641, 3642, 3643, 3644, 3645, 3646, 3647, 3648, 3649, 3650, 3651, 3652, 3653, 3654, 3655, 3656, 3657, 3658, 3659, 3660, 3661, 3662, 3663, 3664, 3665, 3666, 3667, 3668, 3669, 3670, 3671, 3672, 3673, 3674, 3675, 3676, 3677, 3678, 3679, 3680, 3681, 3682, 3683, 3684, 3685, 3686, 3687, 3688, 3689, 3690, 3691, 3692, 3693, 3694, 3695, 36

sixty-two miles from the coast.¹³² Granted that such broad extensions can only be exercised where "reasonable," but the limited claim to jurisdiction is nevertheless extensive.

As an exercise of self-defense jurisdictional expansion, the United States Department of Commerce has established Air Defense Identification Zones which extend from the Atlantic, Gulf, and Pacific coastlines of the United States over a considerable expanse of the high seas. The depths of the Zones are measured by two hours air cruising time from the Nation's coasts.¹³³ Aircraft approaching the coasts of the United States are required to identify themselves. These regulations technically apply only to aircraft, foreign and domestic, intending to enter the United States. Nevertheless, the United States is exercising real, though limited, jurisdiction well beyond the three-mile limit of territorial seas which she claims under international law as the extent of her sovereignty.

Because this is the area of the seas in which the United States alleged that the Pueblo seizure occurred, it is relevant to examine the United States claims beyond her territorial seas. What is claimed as legitimate jurisdictional exercise by one protagonist cannot properly be denied to the

¹³²19 U.S.C., ss. 1701-1711. See Jessup, "Legality of the Anti-Smuggling Act," 31 A.J.I.L. 101 (1937).

¹³³14 C.R.R., ss. 620.12(b)(2) & 630.18 (1952).

sixty-two miles from the coast.¹³² Grounded less than three
 hundred miles from the coast, the "Pescadore," but
 the United States jurisdiction is nevertheless extensive.
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 considerable expanse of the high seas. The depths of the
 zones are marked by two hours air warning time from the
 United States coast.¹³³ Aircraft approaching the coasts of the
 United States are required to identify themselves. These
 regulations conclusively apply only to aircraft, invasion and
 domestic, including to those the United States. Psychologists,
 the United States is exercising self-defense, though limited, jurisdiction
 well beyond the three-mile limit of territorial sea
 which are thus under international law as the system of
 law governing.

Because this is the case of the zone in which the United
 States alleges that the Pescadore seizure occurred, it is safe
 to assume the United States claims beyond the territorial
 limit. That is clear as legislative jurisdiction
 extends of the international domain properly be divided in the

¹³² 19 U.S.C. §§ 1701-1711. See *United States v. The "Pescadore"*, 13 F. Supp. 2d 100 (1957).

¹³³ 18 C.F.R. §§ 120.12-120.13 & 120.14 (1957).

other. Although the United States ratified the 1958 Convention without reservation, the laws extending Contiguous Zones beyond the maximum limit of twelve miles remain on the books. On the other hand, North Korea, which claims twelve miles as a limit to her territorial seas, is not a signatory to this Convention and is not bound to limit her contiguous zones to twelve miles from her coasts until such time as the Convention is established as international law.

other. Although the United States ratified the 1958 Convention without reservation, the laws extending Consignments beyond the normal limit of twelve miles remain on the books. On the other hand, North Korea, which claims twelve miles as a limit to her territorial sea, is not a signatory to this Convention. It is not bound to limit her consignments beyond the twelve mile limit from her coast until such time as the Convention is ratified as international law.

V THE CONTEXT OF THE CRISIS RELATIONSHIP BETWEEN
THE UNITED STATES OF AMERICA AND THE
PEOPLE'S REPUBLIC OF NORTH KOREA

A. A State of War or Peace?

North Korea is a State in the classic sense. She is in possession of fixed territory, containing a permanent population, and she possesses a government which represents and carries on state authority. This, of course, also applies to South Korea. These artificial Republics, formed from the areas of a once integral State along the boundaries of shared occupation between the Soviets in the North and the Americans in the South after the Second World War, reflected the economic and political philosophies of their occupiers.¹³⁴

When the North Korean armies invaded South Korea, the Security Council succeeded in passing a resolution to "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the Area."¹³⁵ The Soviet Union's boycott of that

¹³⁴Baily, supra note 3, at 819.

¹³⁵U.N. Doc. S/1511, June 27, 1950.

V THE CONTENT OF THE CHAIRS RELATIONSHIP BETWEEN
THE UNITED STATES OF AMERICA AND THE
PEOPLE'S REPUBLIC OF NORTH KOREA

A. A State of War or Peace?

North Korea is a state in the classic sense. She is in possession of fixed territory, containing a permanent population, and she possesses a government which represents and carries on state authority. This, of course, also applies to South Korea. These artificial Republics, formed from the pieces of a once integral state along the boundaries of armed occupation between the Soviets in the north and the Americans in the south after the second world war, retained the economic and political homogeneity of their occupants.¹³⁴

When the North Korean strike invaded South Korea, the Security Council succeeded in passing a resolution to restrain such resistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.¹³⁵ The United Nations' support of that

¹³⁴ Bailey, *supra* note 1, at 210.

¹³⁵ U.N. Doc. S/RES/83, June 27, 1950.

Organization for refusing to unseat Nationalist China made the passage of that resolution possible.

1. Legality of the United Nations' Actions in Korea.

Since the relationship between the United States and North Korea began with the Korean War it is first necessary to determine the legality of the United Nations' actions in response to the North Korean invasion of June 24, 1950.

Article 27(3) of the United Nations Charter requires that decisions of the Security Council other than those procedural be made by seven affirmative votes including the concurring votes of the permanent members.¹³⁶ During the critical months of June and July 1950 the Soviet Union, a permanent member of the Security Council, had deliberately absented herself from the Security Council with the intent of destroying the capacity of that organization to function.¹³⁷

Professor Stone argues, not without effect, that due to the nonconformity of the Council to the procedural rules of

¹³⁶L. M. Goodrich and E. Hambro, Charter of the United Nations (Boston: World Peace Foundation, 2d Rev. ed.. (1949), p. 590.

¹³⁷The Soviet Union declared that it would consider none of the resolutions of the Security Council to have any force or effect because two members of the Security Council were absent, namely, the real representatives of China--those sent by the government of Mao Tse-tung--and those of the Soviet Union itself. See also M. S. McDougal, The Veto and the Charter: An Interpretation for Survival, 60 Yale L.J. 258 & 278 (1951).

Organization for seeking to prevent Nationalist China from
the passage of that resolution possible.

1. Legality of the United Nations' actions in Korea.

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to determine the legality of the United Nations' actions
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Article 24(2) of the United Nations Charter requires
that decisions of the Security Council shall be taken by a
majority of nine members including the concurring votes of the
permanent members. The United States, the Soviet Union, and
China are the permanent members of the Security Council. The
United States and the Soviet Union are the only two permanent
members of the Security Council who have not withdrawn from
the Council. The United States and the Soviet Union are the
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The non-alignment of the Council to the permanent members is
the result of the fact that the Council is not a permanent
body. The Council is a body which is composed of members
who are elected for a fixed period of time. The Council is
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the Charter it must be concluded that the "call" to cease fire and the recommendatory resolution of the Security Council of June 27, 1950¹³⁸ asking the United Nations membership to contribute "such assistance to repel the armed attack and to restore international peace and security in the area" were ineffective as legal resolutions.¹³⁹ He continues by pointing out that Articles 43 and 45 of the Charter¹⁴⁰ under which the Security Council acted could not be binding as a decision since those articles depended on special agreements between the individual members of the United Nations regarding the availability of armed forces and such agreements had not as yet been concluded. For this reason, explains Stone, the action taken was in the form of a recommendation rather than a resolution.¹⁴¹

Professor Stone, however, fails to consider Article 106 of the Charter¹⁴² which requires that the five permanent members of the Security Council consult and take joint action as

¹³⁸L. B. Sohn, United Nations Law (Brooklyn Foundation Press, Inc., 2d ed., 1967), p. 480.

¹³⁹J. Stone, Legal Controls of International Conflict (Sydney: Maitland Publications Pty., Ltd., 1954), p. 231 et seq.

¹⁴⁰Goodrich and Hambro, supra note 136, pp. 281-89.

¹⁴¹J. Stone, op. cit., p. 233, n. 29.

¹⁴²Goodrich and Hambro, supra note 136, p. 530 et seq.

the Charter it would be concluded that the "call" to cease fire and the recommendation of the Security Council of June 27, 1950¹³⁸ asking the United Nations membership to contribute "such assistance to repel the armed attack and to restore international peace and security in the area" were ineffective as legal resolutions.¹³⁹ He continues by pointing out that Articles 43 and 45 of the Charter¹⁴⁰ under which the Security Council acted could not be binding as a decision since these articles depended on special agreements between the individual members of the United Nations regarding the availability of armed forces and such agreements had not as yet been concluded. For this reason, explains Stone, the action taken was in the form of a recommendation rather than a resolution.¹⁴¹

Professor Stone, however, fails to consider articles 106 of the Charter¹⁴² which requires that the five permanent members of the Security Council consult and take joint action as

¹³⁸U. S. Govt. United Nations Law (Brooklyn: Foundation Press, Inc., 1950), p. 280.

¹³⁹J. Stone, Legal Control in International Conflict (New York: Columbia Publications Co., Inc., 1954), p. 211.

¹⁴⁰Articles 43 and 45 of the Charter, United Nations Charter, 1945, p. 21-22.

¹⁴¹J. Stone, op. cit., p. 211, n. 22.

¹⁴²Articles 26 and 27 of the Charter, United Nations Charter, 1945, p. 21-22.

necessary so that Chapter VII of the Charter, concerning action to be taken in regard to threats to the peace, might be effectively implemented pending the working out of the special agreements. The Soviet Union's failure to conform to Article 106 of the Charter would hardly prevent joint action under that article by the other members who desired to fulfill their obligations to the United Nations,

Nevertheless, the allegation by the Soviet Union's delegation to the Security Council that Article 27(3), strictly and properly interpreted, prevents the Security Council from functioning in the absence of one of the permanent members was effectively answered by the United Kingdom representative to the Security Council:

(T)o maintain that the Security Council must be powerless because one member in a fit of pique simply boycotts it, is really to admit that the Security Council, and indeed the whole of the United Nations, can function only if it functions in accordance with the wish, and even the behest, of one individual permanent member. . . . I cannot conceive that any rational human being would admit that the theory ought to be abused in such a way as this, more especially since all the great Powers . . . have entered into a solemn obligation to abide by the purposes and the principles of the Charter. . . .¹⁴³

The dispute of whether the Security Council could function when a permanent member of that body was absent in light of Article 27(3) was significant not only regarding the Korean

¹⁴³Sohn, supra note 138, pp. 486-87.

...to the extent in regard to threats to the peace, might be
 effectively implemented pending the working out of the special
 agreement. The Soviet Union's failure to comply in Article
 102 of the Charter would thereby prevent joint action under
 that article by the other members who desire to fulfill
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 Nevertheless, the allegation by the Soviet Union's dele-
 gation to the Security Council that Article 27(3) actually
 and properly interpreted, prevents the Security Council from
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to the Security Council:

(2) To maintain that the Security Council must be
 powerless because one member in a line of five
 simply because it is really to admit that the
 Security Council, and indeed the whole of the
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 that the Security Council ought to be wound in such a way
 as this, most especially since all the great
 powers . . . have entered into a solemn obligation
 to abide by the purposes and the principles of the
 Charter. . . . 141

The question of whether the Security Council would function
 when a permanent member of that body was absent in light of
 Article 27(3) was ultimately not only rejected by the Council

Resolutions' legality but for the existence of the United Nations itself. Professor Gross of Fletcher School of Law and Diplomacy and Professor McDougal of Yale University wrote articles supporting the restrictive and expansive interpretations respectively.¹⁴⁴ As Professor McDougal points out in his article, the practice of the United Nations, together with the fact that the Charter is a constitutional instrument which will evolve in time to merely a framework for the functioning of the United Nations, cannot be given a restrictive interpretation, especially when it does not conform with that body's

¹⁴⁴ See L. Gross, Voting in the Security Council: Abstention from and Absence from Meetings, 60 Yale L.J. 209 (1951), where he said that the framers of the Charter made an error in the unanimity rule but it has to be lived with. For if absence is no more than abstention, then the Council can function if four of the five permanent members are absent from the Security Council meeting, and certainly the framers did not intend this. For these and other reasons determined that Article 27(3) of the Charter could only be read as paralyzing the Security Council if a permanent member was absent. See also McDougal, supra note 137, p. 258. This article begins by pointing out that Article 27(3) of the Charter does not read "all five" permanent members "who must be present and voting." Further, Professor McDougal argues that words do not have clear meanings of themselves but that they must be given a rational meaning within the framework of their purpose. Beyond this the practice of the Body demonstrated that absence was considered an abstention to the point that Goodrich & Hambro in their work on the United Nations, which was sanctioned by that Organization, reached this conclusion prior to the Soviet walkout of January 1950. For these and other reasons the professor believes that the absence of a permanent member will not force the Security Council's functioning to grind to a halt.

practice. The only rational result appears to be the recognition of the voluntary absence of a permanent member of the Security Council as an abandonment of his prerogatives and privileges, thereby permitting that body to function in face of such an absence. The actions of the Security Council and the General Assembly attest to this interpretation of the Charter, not only demonstrating that such an absence will not prevent the Security Council from functioning but confirming that the resolutions of that United Nations Organ after North Korea's invasion of the South were legally binding as well.

2. The Status of the United States Relative to its Position in the Korean Conflict.

The Korean conflict, although officially a "Unified Command" under the United Nations Flag, maintaining peace and security of the world, was, in the words of one author:

in effect, chiefly an American enterprise . . . its political direction was dominated chiefly by the United States. In fact, if it had not been for American initiative the international police force in Korea would not have come into existence at all.¹⁴⁵

If the United States is in law one of the belligerents in the Korean conflict, and that conflict can be classified as a war, it could be argued that the seizure of the Pueblo was North Korea's privilege as a belligerent in time of war depending, of course, upon the effect of the Armistice. For, in time of

¹⁴⁵J. G. Stoessinger, The Might of Nations (New York: Random House, 1963), p. 369.

practice. The only rational result appears to be the recognition of the voluntary absence of a permanent member of the Security Council as an abandonment of his prerogatives and privileges, thereby permitting that body to function in fact as such an absence. The action of the Security Council and the General Assembly agree to this interpretation of the Charter, not only demonstrating that such an absence will not prevent the Security Council from functioning but confirming that the resolutions of that United Nations Organ agree with the Charter's intention of the South were legally binding as well.

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Is the United States in law one of the belligerents in the Korean conflict, and that conflict can be classified as a war, it could be argued that the status of the United States would be primarily as a belligerent in line of war operations, of course, under the terms of the resolution. Now, in time of

war enemy warships can be attacked on sight and either captured or destroyed.¹⁴⁶ The real significance of the United States status is obvious. For if the United States was and remains in a belligerent status relative to the People's Democratic Republic of North Korea and vice versa since the signing of the Armistice Agreement, then the seizure of the Pueblo would be a legal act of belligerency under international law, leaving the United States no recourse to act, and the matter would be closed. Therefore, the legality of any positive action or choice to take positive action against North Korea after that State seized the Pueblo is dependent upon the United States as a State, separate and distinct from its relationship with North Korea through the United Nations during the Korean War, being freed from a status of belligerency as to North Korea under customary international law.

The resolution of the Security Council on July 7, 1950 recommended to all Members of the United Nations acting pursuant to earlier Security Council resolutions in providing troops and other assistance that they make such assistance available to the Unified Command under the direction of the United States; requested the United States to designate a commander for the Command; and authorized the use of the

¹⁴⁶ U.S. Naval War College, International Law Studies 1955, pp. 56 & 397.

very much, whether or not it is attended on sight and either captured or destroyed. The real significance of the United States status is obvious. For if the United States was not remains in a belittled status relative to the People's Democratic Republic of North Korea and vice versa since the signing of the Armistice Agreement, then the balance of the Pueblo would be a legal act of belligerency under international law, leaving the United States no recourse to act, and the matter would be closed. Therefore, the legality of any preventive action at choice to take positive action against North Korea after that date which the Pueblo is dependent upon the United States as a State, separate and distinct from its relationship with North Korea through the United Nations during the Korean war, being then a status of belligerency as to North Korea under customary international law.

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United Nations flag in the course of operations against North Korea.¹⁴⁷

Although the United States did supply about 90 percent of the manpower and material used in the police action, fifteen member states other than the United States and South Korea contributed troops and thirty-seven other members offered to contribute a wide range of supplies and services.¹⁴⁸ The United Nations never considered the hostilities in Korea as an American effort. Both the members of that Organization and the United States Government in particular considered their contributions of men and materials as part of a United Nations effort to maintain international peace and security.¹⁴⁹ President Truman declared that the United States was not at war at the inception of the fighting.¹⁵⁰ Officially, this position was maintained throughout the conflict. The United States Government refused to accept protests addressed to it by the Soviet Union and Red China based on the alleged illegal acts of the American forces in Korea. The United States claimed that the action was a United Nations effort and so insisted that complaints go to the Secretary General of the United Nations.¹⁵¹ In addition to

¹⁴⁷Sohn, supra note 138, p. 481.

¹⁴⁸Stoessinger, supra note 145, pp. 367-68.

¹⁴⁹Sohn, supra note 138, p. 510 et seq.

¹⁵⁰N.Y. Times, June 30, 1950, at 1, col. 5.

¹⁵¹H. Lauterpacht, "The Limits of the Operation of the Law of War," 30 Brit. Y.B. Int'l. L. 206 at 221, n. 152.

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¹⁴⁷Johnson, *op. cit.* note 137, p. 461.

¹⁴⁸Johnson, *op. cit.* note 142, pp. 147-48.

¹⁴⁹Johnson, *op. cit.* note 146, p. 810 *et seq.*

¹⁵⁰R.Y. Times, June 30, 1950, at 1, col. 2.

¹⁵¹J. P. Lawrence, *The Limits of the Operation of the*

Law of War, 10 *Brit. Y.A. Int'l L. J.* 202 at 211, n. 123.

the foregoing, the preponderance of United States assistance is understandable considering its position as a world power and its ability to accomplish the goals desired by the United Nations, whose very existence depended upon the success of its Korean enterprise.

Therefore, the status of the United States, as well as that of the other nations participating in this initial attempt to prevent aggression through the machinery of the United Nations, was not that of a belligerent at war with North Korea in the classic sense. The "belligerency" as it existed would be first between the North Korean "state" and the United Nations as participants in the world order process, and only shared by those states serving in the Unified Command as members thereof.

3. The Juridical Character of the United Nations.

Action in Korea:

The Korean conflict is difficult to classify within the traditional concepts of international law. Although Korea was looked upon as a single state temporarily divided by all parties interested in the conflict, the conflict was not a civil war.¹⁵² The Soviet Union insisted that the dispute in Korea was an internal affair and not within the competence of the United Nations. In fact, the attitude of the proponents of

¹⁵²P.B. Potter, "Legal Aspects of the Situation in Korea," 44 A.J.I.L. 709 (1950).

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both sides was that the Korea recognized by the other was a puppet regime rather than a regime representing the people. Both North Korea and South Korea possessed a constituted government, a fixed population, and a territorial delimitation. The North Korean declaration of war on South Korea is not consistent with its being classified as a civil war. It is difficult to deny that the events after World War II produced a people divided into two states, and the concern regarding which government was legitimate is a question of recognition. There was in fact a war between states when North Korea invaded the South. The classic definition of war could be applied to the fighting between the two Korean governments in that the three basic elements were present: a hostile contention; by means of armed forces; carried on between states.¹⁵³ Nevertheless, the Korean police action by the United Nations forces was not referred to as "war" in the legal sense of the term by the United Nations or by individual members of the United Nations.¹⁵⁴ The United States recognized only the South Korean Government because it alone had conformed with the Resolution of the General Assembly of November 14, 1947 regarding free elections.¹⁵⁵

¹⁵³Dept. of Army Pamph. 27-161-2, 2 International Law 27 (1962).

¹⁵⁴Lauterpacht, supra note 151. See also P.C. Jessup, "Should International Law Recognize an Intermediate Status between Peace and War"? 48 A.J.I.L. 98 (1954).

¹⁵⁵Sohn, supra note 138, at 474-77.

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¹²³Opp. of Army, supra note 121, 27-161-3, 1 International Law 27 (1962).

¹²⁴United Nations, General Assembly, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 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3767, 3768, 3769, 3770, 3771, 3772, 3773, 3774, 3775, 3776, 3777, 3778, 3779, 3780, 3781, 3782, 3783, 3784, 3785, 3786, 3787, 3788, 3789, 3790, 3791, 3792, 3793, 3794, 3795, 3796, 3797, 3798, 3799, 3800, 3801, 3802, 3803, 3804, 3805, 3806, 3807, 3808, 3809, 3810, 3811, 3812, 3813, 3814, 3815, 3816, 3817, 3818, 3819, 3820, 3821, 3822, 3823, 3824, 3825, 3826, 3827, 3828, 3829, 3830, 3831, 3832, 3833, 3834, 3835, 3836, 3837, 3838, 3839, 3840, 3841, 3842, 3843, 3844, 3845, 3846, 3847, 3848, 3849, 3850, 3851, 3852, 3853, 3854, 3855, 3856, 3857, 3858, 3859, 3860, 3861, 3862, 3863, 3864, 3865, 3866, 3867, 3868, 3869, 3870, 3871, 3872, 3873, 3874, 3875, 3876, 3877, 3878, 3879, 3880, 3881, 3882, 3883, 3884, 3885, 3886, 3887, 3888, 3889, 3890, 3891, 3892, 3893, 3894, 3895, 3896, 3897, 3898, 3899, 3900, 3901, 3902, 3903, 3904, 3905, 3906, 3907, 3908, 3909, 3910, 3911, 3912, 3913, 3914, 3915, 3916, 3917, 3918, 3919, 3920, 3921, 3922, 3923, 3924, 3925, 3926, 3927, 3928, 3929, 3930, 3931, 3932, 3933, 3934, 3935

Thus, the United Nations enforcement action was considered at most a limited war of international character to maintain international peace and security and prevent the defiance of the United Nations by North Korea. Both sides acknowledged the applicability of the International Law of War and the Geneva Conventions of 1949.¹⁵⁶ The conduct of the conflict was confined to the Korean Peninsula. Neither side declared war on the other¹⁵⁷ save North Korea's original declaration against the South. Although the Soviet Union and Communist China clandestinely assisted North Korea with arms and, finally, as the United Nations Command approached the Sino-Korean boundary, with Chinese "volunteers," neither ventured to challenge overtly the Unified Command in spite of their claims that the United Nations efforts were illegal. The goals of the action and the war zone remained limited and localized throughout the confrontation and for the two years of armistice talks.

4. The Legal Status Created by the Korean Armistice.

Since neither side succeeded in forcing its will upon the other short of a greatly expanded war effort, and since peace was impossible since by definition that would require a permanently divided Korea, an armistice was signed on July 27, 1953.

An armistice is the cessation of active hostilities for

¹⁵⁶Lauterpacht, supra note 151, at 223.

¹⁵⁷Stone, supra note 139, at 310.

Thus, the United Nations intervention was considered as
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 4. The Local Status Created by the Korean Conflict.
 Since neither side succeeded in forcing the will upon the
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 An indication to the cessation of active hostilities for

¹⁵⁶Footnote, Agreement at 157, at 157.

¹⁵⁷Footnote, Agreement at 157, at 157.

a period agreed upon by the belligerents. It is not a partial or a temporary peace.¹⁵⁸

In the past, armistices were resorted to for administrative and related purposes until a treaty of peace could be concluded to formally end the state of war, and the terms were usually dictated from one side to the other.¹⁵⁹ In Korea, this changed. The terms were limited to cessation of military operations and repatriation of prisoners, together with the creation of machinery to enforce the provisions of the agreement.

The Preamble of the Korean Armistice Agreement declares its authors' purposes to be:

. . . in the interest of stopping the Korean conflict, . . . establishing an armistice to assure a complete cessation of hostilities and of all acts of armed force in Korea until a final peace settlement is achieved . . . said conditions and terms are intended to be purely military in character and to pertain solely to the belligerents in Korea.¹⁶⁰

¹⁵⁸General Armistices are usually of a combined political and military character. They usually precede negotiations for peace. A general armistice is normally concluded by senior military officers or by diplomatic representatives. See Deptt. of Army Field Manual, FM 27-10, "The Law of Land Warfare," s. 483 (1956).

¹⁵⁹M.W. Graham, "Armistices 1944 Style," 39 A.J.I.L. 286 (1945).

¹⁶⁰4 U.S.T.I.A. 236 (1953).

a period agreed upon by the belligerents. It is not a partial or a temporary peace.¹⁵²

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The premise of the Korean Armistice Agreement declares its authors' purpose to be:

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152. See, e.g., "Armistice 1948," 10 A.J.I.L. 204 (1946).

153. O.S.-I.A. 116 (1922).

Does the Korean Armistice, which normally does not end a state of war but only stops hostilities, within the framework of the Korean situation in effect become more than an armistice and actually bring a termination to the war as well?

Traditionally, the most common means to terminate a state of war, setting aside the newer concept of a limited war, is by a treaty of peace between the belligerents. This is usually accompanied in more recent times by a complete subjugation of one of the belligerent powers to the other and a virtual destruction of its political existence.¹⁶¹ A treaty of peace is not the sole means of terminating a state of war, and at times it is diplomatically disadvantageous. Termination of a state of war is a political act, and so must be established through the political arm of the state governments involved.¹⁶²

An armistice, however, has not been recognized as a method of bringing a legal state of war to an end. Although

¹⁶¹W.W. Bishop, International Law - Cases and Materials (2d ed., 1962), p. 785.

¹⁶²The United States, for instance, can end a state of war by legislation as it did with Germany after World War I, or by Presidential Proclamation as it did with Germany after World War II. The First World War was terminated by Joint Resolution of Congress on July 2, 1921 (42 Stat. 105) and on October 24, 1951 President Truman issued a Proclamation declaring the state of war between Germany and the United States terminated, based on House Joint Resolution 289 of October 19, 1951. See Bishop supra note 161, at 700 & 786-87..

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Let W. Bishop, International Law - Cases and Materials
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October 12, 1918 President Wilson issued a proclamation
declaring the state of war between Germany and the United
States terminated, based on House Joint Resolution 200 of
October 12, 1918. The Bishop supra note 101, at 700 &
701-711.

when accompanied by a cessation of hostilities and a withdrawal of enemy forces and where both parties indicate that the war is over, the armistice, given time, may ripen into a legal end to a state of war.¹⁶³ It has become increasingly evident in modern times that there must exist in fact, if not in law, a middle ground--a factual continuum--between peace and war. A number of publicists have referred to the impracticalities of international law in requiring a treaty of peace to conclude a state of war when in fact they are years in the making.¹⁶⁴ These authors see a modern trend to regard general armistice as not merely a permination of hostilities, but as a de facto termination of war.

This is especially true in the Korean Situation. The Armistice provided a status quo ante bellum. It solved none of the problems which caused the war in the first place. Both sides were intact as neither was capable of destroying the other within the scope of a limited war since the United States by its policy decided not to use nuclear weapons. The net result of three years of bloodshed was the loss to the North Korean Government of 1,500 square miles of territory.¹⁶⁵

¹⁶³Bishop, supra note 161, pt 785.

¹⁶⁴Stone, supra note 139, pt 646. See also 10 Whiteman's Digest of International Law. (1968) & Dye, "Legal State of the Korean Hostilities," 45 Geo. L.J. 45 (1956).

¹⁶⁵Baily, supra note 3, pt 827.

When accompanied by a cessation of hostilities and a withdrawal of enemy forces and while both parties indicate that the war is over, the armistice, given that, may then enter a legal and to a state of war. 163 It has become increasingly evident in modern times that there must exist in fact, if not in law, a middle ground--a formal continuance--between peace and war. A number of publicists have referred to the impossibility of international law in restoring a state of peace to conclude a state of war when in fact they are years in the making. 164 These authors see a notable trend to regard general armistice as not merely a preliminary to hostilities, but as a de facto termination of war. This is especially true in the modern situation. The armistice provides a status quo ante bellum. It admits none of the problems which caused war in the first place. Both sides once intent on neither was capable of destroying the other within the scope of a limited war since the United States by its policy decided not to use nuclear weapons. The net result of these facts of observation was the move to the United Nations Government of 1,500 square miles of territory. 165

163. Armistice, 1945, pp. 151, 152.

164. Armistice, 1945, pp. 151, 152. See also in Armistice, 1945, pp. 151, 152. (1945) & Armistice, 1945, pp. 151, 152. (1945).

165. Armistice, 1945, pp. 151, 152.

Akin to this is the fact that there never was a state of war recognized between the United Nations forces and the North Korean and Chinese "volunteer" forces. As there was no formal beginning of a state of war it can be logically accepted that no formal treaty of peace is necessary. This is not true between the Koreans themselves. But even here an armistice might be considered adequate. The lack of political and economic intercourse between the two sections of Korea has been in existence for so long that the continuation of a legal state of war between them will not hurt trade relations and the like. Both sides are determined to reunite the Peninsula as they were prior to the Korean conflict, and so a treaty of peace is impossible.

Therefore, the armistice between the participants in Korea becomes tantamount to a permanent end to the hostilities as they existed after the North Korean invasion of June 1950. Even though the Armistice was limited to military matters still it qualifies as a general armistice, for political matters remained as they existed prior to the hostilities.

Between July 1953, when the Armistice came into effect, and January 1968, the time of the seizure of the Pueblo, the Armistice had remained the only document to demonstrate the end of active hostilities. During that time, as already noted, numerous "serious" violations of the Armistice were recorded on both sides, although the worst incidents were caused by the

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Therefore, the situation between the participants in Korean peninsula tantamount to a permanent and on the hostilities as they existed after the North Korean invasion of June 1950. Even though the Armistice was limited to military matters it will be regarded as a general armistice for political matters remained as they existed prior to the hostilities.

Between July 1953, when the Armistice came into effect, and January 1954, the time of the release of the people, the Armistice had remained the only document to demarcate the end of active hostilities. During that time, as already noted, important "actions" violations of the Armistice were recorded on both sides, although the actual incidents were caused by the

North Korea. The Hague Regulations of 1907 provide:

Any serious violation of the Armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.¹⁶⁶

Were the Armistice considered to be no more than a temporary cessation of hostilities, the United Nations Command could have denounced the Armistice or even resumed hostilities.

This is also true of North Korea. Neither side has so much as considered this a proper course of action. The Korean Armistice has been treated as though it is something more than a temporary end to hostilities. The de facto state of war in Korea has, by the Armistice, become a de facto termination of war.

B. A Legal Analysis of the Claims surrounding the Seizure of the Pueblo

It is best to examine the arguments of each side as though the writer were an advocate for the other protagonist in the dispute, as it points up the inadequacies of the world order system, as it exists today, in dealing with the situation. First, the immediate claims of the Democratic People's Republic of Korea must be considered. These are two: That the Pueblo was a "spy ship" sent by the United States and that it intruded into North Korea's territorial seas, thereby creating serious provocation. Secondly, an inquiry will be made into the counterclaims of the United States that the seizure was an act

¹⁶⁶Dept. Army Field Manual, supra, note 158, at 175.

North Korea, the WAVE Revolution of 1997 provides:

Any serious violation of the Articles by one of the parties gives the other party the right of denouncing it, and even, in case of urgency, of recommending hostilities immediately.

connection of hostilities, the United Nations Commission could

This is also a case of *Staph. aureus*. Weighman also has 50 such

As considered this a proper course of action. The Korean

than a company and its policies. The do have a lot of

• 100 to 200

2. A legal analysis of the claims surrounding the release of the public

It is best to maintain the slowness of each side as

Though the writer was in advance for the other procedures

In the chapter, we go back up the ladder of the world

Good system, as it works today, in dealing with the situation.

Thus, the immediate claims of the democratic regime's legitimacy

of interest must be considered. These are two: (1) the *benefits*

...a "royal" seal of the United States and that it bears

and into North Korea's political system, thereby creating

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consequences of the latter being that the latter is not

of piracy and that the seizure was illegal per se as uncoun-
 tenanced by international law. Last, the acts of both sides
 will be examined as "aggression" to demonstrate that in many
 respects the efforts of the world to outlaw aggression not only
 have failed in their purpose, but could serve to produce a war
 where both sides insist that it was the "aggression" of the
 other that required it to fight a defensive war.

1. The Korean Claims.

The Pueblo was an "armed spy ship" of the United States:

Article 29 of the Hague Regulations defines a spy as
 (1) a person who (2) acting clandestinely or on false preten-
 ses (3) obtains or endeavors to obtain information (4) in the
 zone of operations of a belligerent with the intention of
 communicating it to the hostile party.¹⁶⁷

This definition provides for spying in time of war rather
 than peace, and so the relevance of the Armistice becomes impor-
 tant. The Armistice effectively ended the state of war, for
 if it did not the North Koreans could have claimed that the
 hostilities still existed and thus the seizure of the Pueblo
 was legal under the laws of war. Even in peace, however, spy-
 ing is pursued. Lauterpacht calls spies "Agents without

¹⁶⁷Deptt. Army Pamph., supra note 153, at 57.

¹⁶⁸H.S. Levie, "The Nature and Scope of the Armistice
 Agreement," 50 A.J.I.L. 880 at 904 (1956). During a General
 Armistice belligerents appear to retain the right to capture
 vessels belonging to the enemy.

of piracy and that the behavior was illegal not as an uncon-
 tenanted by international law. Last, the acts of both sides
 will be examined as "aggression" to demonstrate that in many
 respects the efforts of the world to outlaw aggression not only
 have failed in their purpose, but could serve no purpose at all
 where both sides insist that it was the "aggression" of the
 other that started it in light of defensive war.

1. The Korean Situation.

The People was an "armed spy ship" of the United States:

Article 29 of the Hague Regulations defines a spy as
 (1) a person who (2) acting clandestinely or on false pretenses
 (3) obtains or endeavors to obtain information (4) in the
 zone of operations of a belligerent with the intention of
 communicating it to the hostile party.¹⁶⁷

This definition provides for spying in time of war rather
 than peace, and so the relevance of the definition becomes impor-
 tant. The definition effectively ended the state of war, for
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hostilities still existed and that the seizure of the People
was legal under the laws of war. Even in peace, however, spy-
 ing is prohibited. International calls upon "peoples without

¹⁶⁷Article 29, Hague Convention (IV) of 1907.

¹⁶⁸E. C. Langer, "The Meaning and Scope of the Definition
 of a Spy," 20 A.J.I.L. 800 (1926). During a period
 of peace, belligerents agree to refrain from espionage
 against each other.

Diplomatic or Consular Character."¹⁶⁹ They are secret agents of a state sent abroad to acquire military or political secrets. They are sent clandestinely and although such activity is not considered illegal or immoral, spies, if caught, are subject to the municipal law of the capturing state unless they possess a cloak of diplomatic immunity.¹⁷⁰

A spy may be a member of the armed forces, but he must act surreptitiously or under false pretenses to be treated as a spy.¹⁷¹ The Pueblo itself was not disguised. It is conceivable that the claimed purpose of the United States that the vessel was acquiring hydrographic data and radio waves when in addition she was recording and analyzing a much broader scope of information could imply that the vessel was acting under false pretenses. This, however, is stretching the meaning of "false pretense" too far. Both participants were aware of the nationality and the status of the vessel. Its purpose was known to both parties as that of gathering information. Therefore, the personnel, being clearly within the definition of naval forces, could not be tried as spies under any proper definition of the term.

¹⁶⁹Oppenheim-Lauterpacht, supra note 51, at 859 & 862.

¹⁷⁰Id.

¹⁷¹Dep't. Army Pamph., supra note 167, at 58.

diplomatic or consular character. 169 They are secret agents
 of a state sent abroad to acquire military or political
 secrets. They are sent clandestinely and although with active
 duty is not considered illegal or immoral, spies, it is said,
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 purpose was known to both parties as that of gathering infor-
 mation. Therefore, the persons, being clearly within the
 definition of armed forces, could not be tried as spies under
 any proper definition of the term.

169 Consular-Character, 8021 note 61, 62, 63 & 64.

170 Id.

171 Id. 8021 note 61, 62, 63 & 64.

Consequently, even if the vessel encroached into the territorial seas of North Korea in time of war, the personnel aboard the vessel must be given the status of prisoners of war. In time of peace the vessel cannot be seized, as it is a foreign man-of-war. It is illegal to place the personnel aboard the Pueblo in the status of spies and bring them before a local court for adjudication. The current regime of territorial seas does not provide the adjacent state with authority to capture and charge crew members of foreign men-of-war for spying.

Claims that the Vessel Violated the Territorial Waters of North Korea:

On the face of the dispute international law is clear. A foreign man-of-war is immune from seizure not only in international waters but within the territorial seas of states as well. Unless the status of the parties is that of belligerents it is difficult to justify the seizure of a foreign man-of-war at all. If it were to be tolerated as absolutely necessary, a seizure should be the means of last resort. Had the North Korean authorities issued official warnings to the United States Government either through the Military Armistice Commission at Panmunjom or through some mutually recognized power, then proceeded to drive out encroaching United States men-of-war, the seizure of the Pueblo would acquire a guise, at least, of necessity. Should these efforts fail to stop United States encroachment, then a seizure might be tolerated as the only sanction remaining to North Korea. In view of present world practice

Consequently, even if the vessel approached into the territorial zone of North Korea in time of war, the personnel aboard the vessel must be given the status of prisoners of war. In time of peace the vessel cannot be seized, as it is a foreign non-combatant. It is illegal to place the personnel aboard the vessel in the status of spies and bring them before a local court for adjudication. The current regime of territorial waters does not provide the adjacent state with authority to capture and charge any member of foreign non-combatants for spying.

Claim that the vessel violated the Territorial Waters of North Korea:

On the face of the dispute international law is clear. A foreign non-combatant is immune from seizure not only in international waters but within the territorial zone of states as well. Unless the status of the vessel is that of a belligerent it is difficult to justify the seizure of a foreign non-combatant at all. If it were to be tolerated as absolutely necessary, a seizure should be the means of last resort. For the North Korean authorities issued official warnings to the United States Government under the Military Assistance Commission at Panmunjom at least once actually recognized power, then proceeded to drive and approaching United States non-combatant, the status of the vessel would become a question of fact, or peace. Should these efforts fail in some future future action, then a seizure might be justified as the only action remaining to North Korea. In case of present world practice

regarding intelligence-gathering vessels, there can be no justification in the North Korean claim that the Pueblo violated its territorial seas. There is no concrete evidence that the Pueblo was ever closer than thirteen miles to the shores of North Korea.¹⁷² The United States offered the evidence it had. The North Korean authorities, who had the ship's logs and records, offered only confessions of crew members for proof of the encroachment.

2. United States Counterclaims.

The Seizure as Piracy:

Piracy in its strictest meaning is every unauthorized act of violence committed by a private vessel on the open sea against another vessel, with the intent to plunder.¹⁷³ However, it can be argued that the concept of piracy has been extended from its intended meaning and that it now applies to all ruthless acts of lawlessness on the high seas by whomsoever committed.¹⁷⁴ Nevertheless, this seizure cannot be classified as piracy for a number of reasons.

¹⁷²Soviet intelligence-gathering vessels regularly take station in South Korean waters, the waters off the coast of Viet-Nam, and near the United States airbase in Guam. They are likewise stationed off the harbors of San Francisco and Charleston, South Carolina, observing the movement of the nuclear submarines of the United States Navy. They remain beyond the territorial seas of the United States. See N.Y. Times, Jan. 25, 1968, at 14, col. 8.

¹⁷³Oppenheim-Lauterpacht, supra note 51, at 609.

¹⁷⁴Id., at 612-14.

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1966, at 14, col. 1.

¹⁷³ Oppenheim-Lauterpacht, supra note 21, at 509.

¹⁷⁴ Id., at 512-13.

Piracy can be committed on the open seas and in situations where the attack was from the open seas, under customary international law.¹⁷⁵ If the facts prove that the vessel was seized in North Korean territorial waters it must be shown that the seizure resulted from a descent upon the Pueblo from the open seas. Should this be successfully demonstrated the argument remains untenable unless it can be shown that the actions and intent of the North Koreans were piratical and without governmental authority, since only under such circumstances can a man-of-war be designated a pirate vessel.

The North Korean patrol vessels which seized the Pueblo undoubtedly had the support of their government. Those vessels were readily recognizable as men-of-war. These facts were demonstrated by the events subsequent to the seizure. As they were men-of-war, the maximum redress possible under international law, assuming there were unjustified acts of violence, would appear to require a form of redress from the flag state.¹⁷⁶

Moreover, the Convention on the High Seas of 1958, to which the United States is a party, further limits the application of the term "piracy." Acts of violence constituting piracy can only be attributed to warships whose crew has mutinied and controls the vessel to which those deeds are attributed.¹⁷⁷

¹⁷⁵Oppenheim-Lauterpacht, supra note 51, at 615;¹⁷⁶Id., at 610.

¹⁷⁷See U.S. Naval War College, supra note 32 at 207, art. 16.

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tions where the attack was from the open sea, under customary
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seized in North Korean territorial waters it must be shown
that the seizure resulted from a descent upon the Samdo from
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sels were readily recognizable as war-of-war. These facts
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tion of the term "piracy." Acts of violence constituting piracy
can only be attributed to warships whose crew has committed and
controls the vessel in which these acts are attributed.¹⁷⁷

¹⁷⁵Oppenheim-Lauterpacht, op. cit. note 11, at 111, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

¹⁷⁶Id., supra note 11, at 107, note 11.

There is no evidence that a charge of piracy could be successfully applied to the North Korean patrol vessels or their crews.

The Counterclaim that the Seizure of the Pueblo was
Illegal per se as a Matter of International Law:

Traditionally international law grants warships an extra-territoriality as floating portions of their flag states and as such entitles them to immunity from the jurisdiction of any state, not only on the high seas but in foreign territorial waters as well.¹⁷⁸ This immunity even extends to foreign ports.¹⁷⁹ Under currently applicable international law the warships of all nations are entitled to navigate the open seas without interference from any other state. This even extends to naval vessels engaged in intelligence-gathering activities.¹⁸⁰

North Korea apparently does not dispute this right on the open seas since her communiques claim that the Pueblo was within her territorial seas and remained there after repeated

¹⁷⁸Oppenheim-Lauterpacht, supra note 51, at 282, 461, & 852-55. See also Svarlien, supra note 82 at 195, & Colombos, supra note 82, at 196.

¹⁷⁹The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812). The United States Supreme Court held that as a matter of international law a state must give complete immunity to visiting foreign warships. McDougal and Burke, supra note 53, at 135 state: "So well established is this consensus that modern attempts to interfere with warships in foreign ports are virtually non-existent. . . ."

¹⁸⁰The United States recognizes the right of the intelligence-gathering vessels of the Soviet Union to navigate and hover beyond the three-mile limit of the United States and its territories.

There is no evidence that a charter of piracy would be success-
fully applied to the North Korean period vessels on these
crimes.

The Commission that the Bureau of the People's
illegal act as a factor of international law:

Traditional international law grants sovereignty to states
territorially as floating portions of their flag states and
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¹⁷⁹ Oppenheim-Lauterpacht, *supra* note 21, at 503, 461,
§ 851-52. See also Brevint, *supra* note 21 at 101, 4 Columbia,
supra note 21, at 192.

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intelligence-gathering vessels of the United States to pass
free and open beyond the three-mile limit of the United States
and its territories.

requests to leave. This was the apparent basis for her act of seizure.

In time of war, capture and seizure of a belligerent's men-of-war is permissible.¹⁸¹ As the North Korean authorities failed to refer to this at all, it could be argued that they did not consider a state of war to be in existence. This is further bolstered in their threats to treat the officers and crew of the Pueblo as spies. This would not be consistent for in a case of belligerency they must be considered as prisoners of war.¹⁸²

At times other than wartime coastal states have the right to request that a foreign warship leave its territorial sea and complain to the vessel's flag state if the war vessel refuses to comply wherever the vessel has violated or continues to violate the coastal state's regulations. The coastal state can even forcefully compel the foreign war vessel to depart its jurisdiction.¹⁸³ Nevertheless, it is a fundamental rule that warships cannot form the object of a seizure, arrest, or

¹⁸¹U.S. Naval War College, supra note 146, p. 56. See also p. 397, Law of Naval Warfare, art. 503(a)(2): "Enemy warships and military aircraft may be captured outside neutral jurisdiction. Prize procedure is not used for such captured vessels and aircraft because their ownership immediately vests in the captors' government by the fact of the capture."

¹⁸²Id., p. 399, art. 511(a).

¹⁸³Colombos, supra note 92, pp. 194 & 196, & Oppenheim-Lauterpacht, supra note 51, pp. 854-55.

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of violence.

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refuses to comply. However the vessel has violated or continued

to violate the coastal state's regulations. The coastal state

can even potentially suspend the foreign war vessel to demand

its jurisdiction.¹⁸³ Nevertheless, it is a fundamental rule

that warships cannot form the object of a seizure, arrest, or

¹⁸¹U.S. Naval War College, supra note 140, p. 56. See

also p. 327, Law of Naval Warfare, art. 52(4)(3): "Military and military aircraft may be captured outside neutral jurisdiction. This procedure is not used for such captured vessels and aircraft because their ownership immediately vests in the captor's government by the fact of the capture."

¹⁸²Id., art. 51(c).

¹⁸³Id., art. 51(c).

¹⁸⁴Id., art. 51(c).

detention by any legal means whatsoever or by any judicial process.¹⁸⁴ Therefore the law is clear and North Korea's seizure of the Pueblo is illegal per se and constitutes a grave breach of international law.

Yet North Korea can argue successfully that she had a legal right to seize the vessel. Her propaganda implied her case under the Armistice at the time of the seizure although, possibly due to an inadequate forum, she never presented an adequate legal defense.

Assuming that the Armistice was not a de facto termination of hostilities but rather a general armistice agreement in the classic sense, seizure of the belligerent's man-of-war is probably permissible under international law, even during the period that the armistice is in force.¹⁸⁵ Of course, if the United States intelligence-gathering activities are completely independent of United States activities as part of the United Nations Unified Command, the United States might not qualify as a belligerent. Much depends on the nature of the United States position.

On the other hand, granting that the Korean Armistice is an actual termination of the de facto war, as I believe the evidence indicates, the North Korean actions can still be justified under the Armistice.

¹⁸⁴Colombos, op. cit., p. 196.

¹⁸⁵See note 168 supra.

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evidence indicates, the North Korean seizure can still be

justified under the Armistice.

124. Colson, op. cit. p. 124.

125. See note supra.

Article II, paragraph 12 of that Agreement requires that:

. . . the Commanders of the opposing sides shall order and enforce a complete cessation of all hostilities in Korea by all armed forces under their control including all /naval/ units. . . .¹⁸⁶

Paragraph 15 of the same Article continues:

This Armistice shall apply to all opposing naval forces, which naval forces shall respect the waters contiguous to the Demilitarized Zone and to the land area of Korea under the military control of the opposing side. . . .¹⁸⁷

Were the Pueblo within the territorial seas of North Korea it would appear that the Armistice agreement was violated. Consider the broad language of this paragraph: ". . . shall apply to all opposing naval forces. . . ." This could be interpreted to mean either all naval forces of the various countries participating, as they are attached to the Unified Command. Or it could refer to all the naval forces of all the participating countries, whether or not they are under the Unified Command or operating under orders directly from their governments. The latter interpretation appears to be the better one, for all hostilities were to cease. Thus the violation of the Armistice agreement could justify the action taken by North Korea for the extremity of the action must be measured against the gravity of the provocation presented by that vessel's location and activities.

¹⁸⁶4 U.S.T.I.A. 239 (1953); ¹⁸⁷Id., at 243.

Article II, paragraph 12 of that Agreement requires that:

... The Commanders of the opposing sides shall order and enforce a complete cessation of all hostilities in Korea by all armed forces under their control including all naval units. . . . 1953

Paragraph 12 of the same Article continues:

This Article shall apply to all opposing naval forces, which naval forces shall respect the waters contiguous to the demilitarized zone and to the land area of Korea under the military control of the opposing side. . . . 1953

With the purpose within the territorial seas of North Korea is

would suggest that the restriction agreement was violated. Com-

mands the broad language of this paragraph. . . . shall apply

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to mean either all naval forces of the various countries par-

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latter interpretation appears to be the better one, for all

hostilities were to cease. Thus the violation of the restriction

agreement could justify the action taken by North Korea for

the entirety of the action was the necessary action against the gravity

of the provocation generated by that vessel's hostility and

hostilities.

Granting for a moment that the Pueblo never entered North Korean waters but at all times remained beyond the twelve-mile limit, there is still justification for the seizure as a violation of the Armistice Agreement. Notice the words "shall respect the waters contiguous to . . . the land area of Korea . . . of the opposing side." The meaning is hardly explicit. This resulted from a failure to agree on terms. The United Nations Command recognized a maximum permissible breadth of the maritime belt at three miles. North Korea would agree to nothing less than twelve miles, and the Republic of Korea maintained its "Rhee Line" which extends from 60 to 200 miles from that country's coastlines.¹⁸⁸ This vagueness could result in a claim by North Korea that its contiguous zones extend beyond twelve miles under the Armistice Agreement.

Secondly, the North Koreans could argue that they have contiguous security zones extending beyond twelve nautical miles from their coasts. The United States itself has exercised such broad limited-jurisdictional claims, and what is sauce for the goose is sauce for the gander. The 1958 Convention on the Territorial Seas and the Contiguous Zone, Article 24¹⁸⁹ limits the maximum contiguous zone to a claimed distance of twelve miles from the base line used to measure the territorial seas and also to purpose, security being not mentioned in permissible

¹⁸⁸Levie, supra note 168, at 906.

¹⁸⁹U.S. Naval War College, supra note 32, pp. 200-01.

Granting for a moment that the Passo never entered North Korean waters but at all times remained beyond the twelve-mile limit, there is still justification for the claim as a violation of the Armistice Agreement. Notice the words "shall respect the waters contiguous to . . . the land area of Korea . . . of the opposing side." The meaning is hardly explicit. This resulted from a failure to agree on terms. The United Nations Command recognized a maximum possible breadth of the maritime belt at three miles. North Korea would agree to nothing less than twelve miles, and the Republic of Korea maintained its "Inner Line" which extends from 64 to 100 miles from that country's coastline.¹⁸⁸ This vagueness could result in a claim by North Korea that its contiguous zone extends beyond twelve miles under the Armistice Agreement.

Secondly, the North Koreans could argue that they have contiguous waters extending beyond twelve nautical miles from their coast. The United States itself has maintained such broad limited-jurisdictional claims, and what is asked for the Passo is more for the general. The 1956 Convention on the Territorial Sea and the Contiguous Zone, Article 24¹⁸⁹ limits the maximum contiguous zone to a claimed distance of twelve miles from the coast line used to measure the territorial sea and also for purposes, mostly being not mentioned in particular.

¹⁸⁸ United Nations Yearbook of International Law, Vol. 1, 1956.

¹⁸⁹ U.S. Navy and Marine Corps, United States Navy, 1956-57.

uses. Since the 1958 Conventions are not established as international law, only signatories to the Conventions are bound by these limitations. The United States, but not North Korea, is a signatory.

A third argument to justify the actions of North Korea is the claim that the Pueblo encroached upon North Korean territory--if not physically, then unquestionably by the incursion of her radar and intelligence-gathering apparatus into the airspace and sea space within her jurisdiction. Such actions were closely akin to the actions of other ships which hovered off the coasts of the United States although not bound for United States ports, in order to deliver their illicit liquid cargo in defiance of the laws of the United States.

This last argument is equally convincing without the support given by the terms of the Armistice Agreement. Recall the development of and the current status regarding the law of the territorial seas and the contiguous zone briefly set out in an earlier section of this paper. Although the navigation of coastal seas by foreign men-of-war may be permitted (it is doubtful that North Korea would have to accept this as her seas do not constitute an international strait), hovering within foreign coastal seas of a state is nowhere in international law condoned outside of emergency situations. Neither the Corfu Channel Case nor the 1958 Convention could be extended to incorporate the toleration of the hovering of a foreign man-of-war

laws. Since the 1928 Convention is not established as
 international law, only signatories to the Convention are
 bound by these limitations. The United States, not North
 Korea, is a signatory.
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 of coastal seas by foreign war-of-war may be permitted (it is
 doubtful that North Korea would have to accept this latter seas
 do not constitute an international state), however within
 foreign coastal zone of a state is subject to international law
 concerned outside of emergency situations. Whether the courts
 cannot demand the 1928 Convention could be considered in the
 category the collection of the hovering of a foreign war-of-war

within the territorial seas of a coastal state. This violation of North Korea's quasi-sovereign territory requires that North Korea have a legally justifiable alternative to prevent such challenge to her integrity. I suggest at this point that North Korea's actions are not unreasonable.

For the sake of argument, and to reduce the confusing number of issues presented by the facts of this case, assume that the Pueblo was hovering immediately outside the territorial seas of North Korea and that she proceeded further to sea upon being challenged by the North Korean patrol boats--where she was captured. Assume further that the vessel was on a mission totally unconnected with the Unified Command of North Korea, thereby eliminating the difficulties presented by the clauses of the Armistice Agreement. Assume further that the United States can in no way be linked legally to the Korean hostilities of the early fifties, so that North Korea cannot claim the United States is a "hostile power" by reference to the United Nations police action. The North Korean authorities still retain a justification for their actions under the inherent right to self defense.¹⁹⁰ Exactly how extensive this right is, especially

¹⁹⁰See McDougal and Feliciano, Law and Minimum World Public Order (New Haven: Yale Univ. Press, 1961), p. 174 et seq., wherein consideration is given to the attempts to limit the right of self-defense under the United Nations Charter to discourage its indiscriminate use by potential aggressors and yet maintain the right insofar as necessary to maintain and preserve international peace and friendly relations among nations.

within the territorial zone of a coastal state. This violation of North Korea's 'dual-sovereignty' principle requires that such Korea have a legally justified right to intervene to prevent such challenge to her integrity. I suggest at this point that North Korea's actions are not unbecomingly.

For the sake of argument, and to reduce the complexity of issues presented by the facts of this case, assume that the Pronto was hovering immediately within the territorial zone of North Korea and that the presumed intent to use upon being challenged by the North Korean patrol boats--where the war occurred. Assume further that the vessel was on a mission closely connected with the United Command of North Korea, thereby eliminating the difficulties presented by the claims of the American Government. Assume further that the United States can in no way be linked legally to the narrow boundaries of the early incident, so that North Korea cannot claim the United States is a "hostile power" by reference to the United Nations General Assembly. The North Korean authorities still retain a jurisdiction over these actions under the international right to self defense.¹⁰⁰ Clearly the objective here is, separately,

¹⁰⁰ See National and Political, Law and Religion, and the United Nations (New York: Yale Univ. Press, 1961), p. 12-13. The right of self-defense is given in the Charter to the right of self-defense under the United Nations Charter to discourage the international use of potential aggressors and yet maintain the right of self-defense as necessary to maintain and preserve international peace and friendly relations among nations.

in light of the United Nations Charter, requires serious consideration. This will be considered below in more detail. But, considering the difference in size and power of the participants in the Pueblo seizure, the relative threat to the values of each state represented by the presence of the foreign man-of-war, and the values each sought to protect by its activities, the North Korean authorities can support substantially the claim that their actions were necessary to preserve their territory from United States aggression.

C. Aggression, Self Defense, and the Pueblo

As the seizure of a foreign warship is not permitted under international law, such an act could be considered by the victim state as an act of war. It is a clearly aggressive act even where done under a defensive aspect. Today the world is attempting to develop a world public order system which can successfully cope with the crises situations which develop between nations and peoples. Especially since World War I, the leading nations of the world believed it vital that warlike acts be curtailed. Their efforts led to the establishment of world diplomatic organizations and to attempts to define "aggression" so that such acts could be quickly condemned and the perpetrators punished.

In 1919, the League of Nations was created in the first, although unsuccessful, attempt to prevent international wars

in light of the United Nations Charter, regular sessions
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3. Aggression, Self Defense, and the World

As the seizure of a foreign territory is not permitted under
 international law, such an act could be considered by the
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 the perpetrators punished.
 In 1919, the League of Nations was convened in the first
 attempt to prevent international wars

as a means of settling disputes between countries.¹⁹¹ The Kellogg-Briand Pact¹⁹² (Pact of Paris) of 1928 specifically outlawed resort to war to solve international controversies and bound the contracting parties to solve all international disputes solely by pacific means. Among the original fifteen signatories to the Pact were Germany, Japan, Italy, and the U.S.S.R.¹⁹³

These noble attempts resulted in failure and World War II only increased the desire for a permanent end to war on the part of the nations of the world. The United Nations Charter represented a renewed attempt to create a multinational forum in the continued belief that such a body is needed to cultivate friendly relations among states. The purposes of this organization are among others: (1) to maintain international peace and security; prevent and remove threats to the peace; suppression of acts of aggression or other breaches of the peace; (2) to bring about by peaceful means adjustment and settlement of international disputes; (3) to develop friendly relations among

¹⁹¹The Covenant of the League of Nations began: "In order to promote international cooperation and to achieve international peace and security by the acceptance of obligations not to resort to war, . . ." See L.B. Sohn, Basic Documents of the United Nations (Brooklyn: Foundation Press (2d Ed., 1968), p. 295.

¹⁹²46 Stat. 2343, 94 L.N.T.S. 57.

¹⁹³Bishop, supra note 161, p. 755.

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U.S.A. 193

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Nations (Geneva: Foundation Press, 1945), p. 105.

¹⁰²See also, 1928, 34 Stat. 204.

¹⁰³See also, 1928, 34 Stat. 204.

nations, and (4) to solve economic, social, and other problems through international cooperation.¹⁹⁴

In pursuit of these goals Article 2(4) of the Charter requires that:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.¹⁹⁵

Article 51 of the Charter balances this restriction on the use of arms by recognizing the need for self-defense.

Nothing in this Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.¹⁹⁶

The United Nations Charter was framed so as to deliberately avoid the term "war" as well as a specific definition of "aggression," although it clearly attempted to provide adequate sanctions against the possibility of future armed hostilities.¹⁹⁷ Since the United Nations began to function repeated attempts have been made to adopt a specific definition which would include all actions constituting aggression. This has yet to be accomplished. On one side of the debate are those states which want aggression defined because they believe that the use of effective sanctions would be enhanced

¹⁹⁴United Nations Charter, Art. 1.

¹⁹⁵Sohn, supra note 191, p. 2; ¹⁹⁶Id., p. 12.

¹⁹⁷United Nations Charter, Chapters VI through VIII.

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Nations which would define aggression, the United Nations has

believe that the use of effective sanctions would be enhanced

¹⁹⁴United Nations Charter, Article 1.

¹⁹⁵United Nations Charter, Article 2(4).

¹⁹⁶United Nations Charter, Article 51.

and that the would-be aggressors could more easily be identified, thereby discouraging all forms of direct and indirect aggression. Other states, including the United States, consider that attempts at a sufficiently comprehensive definition of "aggression" are futile and that anything less in scope would be harmful since it would curtail the ability of the United Nations to respond to threats to the peace by virtue of the definition, while potential aggressors, having the adopted definition before them, could insure no United Nations interference by limiting their aggressive hostilities to activities beyond the scope of the definition.¹⁹⁸

The United States fears that an officially adopted definition would create a burden on the Organization with which it might be unable to cope, since it is already limited in its responsive capacities through the need for permanent member agreement in the Security Council. The difficulties are further increased by the fact that frequently aggression is claimed to be merely the exercise of the right of self-defense by the nations engaging in the armed hostilities. The Soviet Union proposed a listing of examples of direct aggression and included such factors as the State which first declares war against another state, or invades, bombards, or lands troops therein without permission; engages in Naval Blockade or supports armed bands which engage in attacks on a nearby state.

¹⁹⁸McDougal and Feliciano, supra note 190, pp. 61 & 62, n. 149.

and that the would-be aggressor would have easily been identified, thereby discounting all forms of direct and indirect aggression. Other states, including the United States, consider that attempts at a sufficiently comprehensive definition of "aggression" are futile and that anything less in scope would be harmful since it would curtail the ability of the United Nations to respond to threats to the peace by virtue of the definition, while potential aggressors, having the adopted definition before them, could insure no United Nations intervention by limiting their aggressive hostilities to activities beyond the scope of the definition.¹²

The United States feels that an officially adopted definition would create a burden on the Organization with which it might be unable to cope, since it is already limited in its responsive capacities through the need for permanent members agreement in the Security Council. The distinction was further reinforced by the fact that friendly aggression is claimed to be merely the exercise of the right of self-defense by the nation concerned in the armed hostilities. The Soviet Union proposed a list of examples of direct aggression and included such actions as the State which first declares war against another state, or invades, occupies, or annexes territory without permission of the United Nations. It suggested that such actions be treated as a deadly state.

The Soviet definition also includes forms of indirect aggression such as encouraging subversive activities or promoting civil war, and gives examples of economic and ideological aggression.¹⁹⁹ The Soviet definition could result in labelling the United States attempts at containing Communism as aggression, requiring an embarrassing loss of face for the United States if embraced by the United Nations.²⁰⁰ This would give an open door to Communist expansionist activities in the form of "wars of national liberation" which, due to the clandestine activities of the communist states not Members of the United Nations, could not be successfully labelled as aggression or dealt with either by the United Nations or by the United States under the theory of collective self-defense. In the present world order system it is to the advantage of the free world that no definition of aggression has been forthcoming, for the hands of the free world would be tied in the face of an imperialistic philosophy known as Communism.

Since a definition has yet to be agreed upon, the determination of what constitutes an aggressive act remains a subjective test. Each nation applies the term as it finds useful and appropriate to justify its own actions and condemn the acts of other states before the world.

199. R.V. Hansen, "Defining Aggression - United States Policy," 21 Naval War College Review 80, at 93 & 94 (Dec. 1968).

200. Id.

The Soviet definition also includes forms of indirect aggression such as encouraging subversive activities or promoting civil war, and gives examples of economic and ideological aggression.¹⁹⁹ The Soviet definition could result in labeling the United States attempt at containing Communism as aggression, requiring an embarrassing loss of face for the United States if embraced by the United Nations.²⁰⁰ This would give an open door to Communist expansionist activities in the form of "war of national liberation" which, like the subversive activities of the communist states not members of the United Nations, could not be successfully limited as aggression or dealt with either by the United Nations or by the United States under the theory of collective self-defense. In the present world order system it is in the advantage of the Great Powers that no definition of aggression has been forthcoming. The two words of the "free world" would be tied in the face of an ideological hostility known as Communism.

Since a definition has yet to be agreed upon, the determination of what constitutes an aggressive act remains a subjective task. Each nation applies the law as it finds useful and appropriate to justify its own actions and condemn the acts of other states before the world.

199. A.V. Kozlov, "Defining Aggression - United Nations," *Journal of the American Academy of International Law*, 37 (1943), 100-110.

Perhaps the most workable definition of "aggression," suggested by Professor McDougal, is that form of uninvited interference which is directed by one state or group of states, either by the direct participation of or with the encouragement or support of its officials, against another state or group of states in a manner directly destructive of the basic values of the target state or the world at large.²⁰¹ This definition provides a workable frame of reference in which to consider the Pueblo Incident as it is, with violent, as opposed to peaceful, means of persuasion by which the North Korean goals were accomplished.

The use of armed force is permitted, under the Charter, in two situations which cannot be labelled as "aggression," and therefore can legally be used: action taken by the Security Council or, if necessary, by the members of the United Nations separately under General Assembly action pursuant to the "Uniting for Peace" Resolution of 1950, to maintain international peace and security or prevent a threat to the peace, and by states individually or collectively, under the inherent right of self-defense. Armed enforcement actions under the United Nations Charter are not applicable to the coercion situation created by the Pueblo Incident, nor do they present difficult legal questions in themselves for such action is not classified

²⁰¹McDougal and Feliciano, *supra* note 190, chap. 1.

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 Council or, if necessary, by the members of the United Nations.
 especially under Chapter VII, which provides for the
 "Uniting for Peace" Resolution of 1950, to maintain interna-
 tional peace and security or prevent a threat to the peace, and
 to ensure individually or collectively, under the inherent right
 of self-defense, armed enforcement action against the United
 Nations Charter and has applications to the current situation
 created by the United Nations, not to their present military
 legal position in themselves for such action is not classified

¹⁰¹Approved and finalized, August 1950, para. 1.

as aggression by rational decisionmakers nor is such action pursuant to an United States determination challenged covertly by Members of that Organization, for world opinion will almost unanimously support a United Nations decision. It is outside of that Organization that difficult issues arise when both sides claim that they are engaging in an action of self-defense while their enemy is the aggressor. The concept of self-defense must be examined as both participants claim that self-defense was the motive for their actions--which led to a world crisis on January 23, 1968.

The right of self-defense under general international law is as vague as it is unquestioned, and as liable to abuse in its application as it is indispensable in the present phase of the international society.²⁰²

The claim of self-defense is most conspicuous when it is used in response to a violent and substantial military attack initiated against it, such as the response of the United States to the attack on Pearl Harbor, Hawaii, by the armed forces of the Japanese Empire in December 1941. Less obvious and more difficult to assess are claims of self-defense where one participant attacks another to prevent an anticipated attack by him. This was the claim of the Israeli Government when it initiated the actual armed warfare against its neighbors in June 1967. The difficulty here is that the attacking state is

²⁰²Stone, supra note 139, p. 243.

is suggested by national decision-makers not in such action
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 national law is as vague as it is unquestioned,
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The claim of self-defense in most contemporary cases is
 is used in response to a violent and substantial military attack
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 June 1967. The difficulty here is that the necessary action is

²⁰² Brown, *supra* note 135, at 241.

making a value judgment that may or may not be accurate and, regardless of the truth, the various states in the world arena will support their ally against their (and his) enemy. This response by allied states prevents, frequently for long periods of time if not permanently, an adequate or timely appraisal of the situation by a neutral body. A third type of assertion of self-defense is coercion against third states, even a non-participant in the original conflict, by one belligerent in order to prevent injury through the assistance, either intentional or inadvertent, by that third state which could allegedly cause grave injury to the state using coercion.

The British destruction of the French Fleet in the Mediterranean in 1940 after the German victories in Western Europe, to prevent Germany from acquiring it, serves as an example. This type too requires self-determination, and is thereby subject to dispute as to who is the aggressor and who is the defender. These claims are frequently asserted as self-defense or self-preservation or necessity. None of them, except perhaps for the first, are actually a response to a threat against independence or to territorial integrity of the acting state.²⁰³

The right of self-defense requires that the action taken

²⁰³ McDougal and Feliciano, supra note 190, p. 209 et seq. See also W.T. Mallison, Jr., "Limited Naval Blockade or Quarantine Interdiction: National and Collective Defense Claims Valid Under International Law," 31 Geo. Wash. L. Rev. 335 et seq. (Dec. 1962).

be necessary and in proportion to the threat facing the participant claiming the right. To analyze the problem at hand the variables recommended by Professor McDouglas²⁰⁴ will be used²⁰⁴ to answer the issues presented by the Pueblo-North Korean coercive situation, namely, an examination of the participants, their objectives, methods, conditions, and effects in order to determine whether the current international public order system can solve the dispute and, if not, what is required.

D. The Parties to the Incident in the Light of the Situation

1. The Participants.

It is first necessary to identify the participants in order that the dispute may have focus. Immediately involved are two: the United States of America and the People's Democratic Republic of Korea. On the next level are the U.S.S.R., the Republic of Korea, and the United Nations. These latter are interested incidentally and participate not as immediate decision-makers in the seizure, but as interested observers and potential actors in the conflict. The U.S.S.R. created the North Korean Government and maintained that the Korean "war" was an internal matter involving Korea at the time the Republic of Korea was invaded.²⁰⁵ Secondly, the Soviet Union,

²⁰⁴ McDougal and Feliciano, op. cit., p. 220 et seq.

²⁰⁵ Id., p. 221.

be necessary and in proportion to the course facing the participant claiming the right. To analyze the problem as hand the variables recommended by Professor Schattschneider need to answer the issues presented by the Pueblo-Morich Korean coercive situation, namely, an examination of the participants, their objectives, methods, conditions, and effects in order to determine whether the current international public order system can solve the dispute and, if not, what is required.

B. The Parties to the Incident in the
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²⁰² McDougal and Wellman, supra, note 1, p. 130 at end.

as a state which utilizes intelligence-gathering vessels, will be interested in observing the United States reaction as an experience she herself could suffer as a similar embarrassment.²⁰⁶ Thirdly, as an ally and protector of North Korea, an enlarged conflict could draw the Soviets into the dispute.

The United Nations is virtually always involved in such crises as that Organization is responsible for the maintenance of international peace and security. A special interest exists in this case because of the United Nations previous and continuing commitment to South Korea which, if not a universally recognized state, is, at least, a distinct and relatively permanent territorial unit which that Organization is obliged to defend.²⁰⁷

The Republic of Korea relies upon the United States for guidance and protection against the enemy government of the North. She sees the seizure of the Pueblo as a test of the strength and courage of her defender, without whom she would

²⁰⁶N.Y. Times, June 12, 1968, at 6, col. 6. It was reported that the Soviet intelligence vessel Kegostrov was released by Brazil after the Soviet Union apologized and paid an indemnity. The vessel was seized on May 4, 1968 or thereabouts by the Brazilian Navy two miles off the coast of Brazil. The vessel was released on May 24, 1968, about twenty days after the seizure. The handling of this situation indicates that the Soviets learned something from the United States experience. This was handled quietly and swiftly. Russia did not make a big show of it because the options opened only made the large power look helpless. The Soviets paid the fine and let the matter rest.

²⁰⁷McDougal and Feliciano, supra note 190, p. 221.

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of international peace and security. A special interest exists
in this case because of the United Nations previous and con-
tinuing commitment to South Korea which, if not a universally
recognized state, is, at least, a distinct and relatively
permanent territorial unit which this Organization is obliged
to defend.

The Republic of Korea relies upon the United States for
guidance and protection against the heavy government of the
North. The case the existence of the Republic as a part of the
strength and courage of her defender, without whom she would

W.V. Times, June 11, 1968, at 3, col. 6. It was
reported that the Soviet intelligence vessel Kaptsov was
released by Brazil after the Soviet Union recognized and paid
an indemnity. The vessel was seized on May 6, 1968 on the
shore by the Brazilian Navy two miles off the coast of Brazil.
The vessel was released on May 11, 1968, about twenty days after
the seizure. The handling of this situation indicates that
the Soviet Union learned something from the United States experience.
This was handled calmly and quickly. Russia did not want a
big show or it became the action opened only with the late
power loss height. The Soviet paid the fine and let the
vessel rest.

probably not survive. She considers retaliation not as a possible igniting force for a world conflagration, but rather as a confirmation of her ally's loyalty.

The primary participants in this affair are the "owner" and the "seizer" of the Pueblo. The United States is the wealthiest and most powerful nation-state the world has known. In the relatively short span of one hundred and fifty years this country grew from a rebellious colony of Great Britain to be twice the savior of Europe and the defender of the free world.²⁰⁸ The United States has always been linked to West Europe and at least grew up in those international law traditions if not actually and at all times a participant and contributor in its development. Therefore, the United States could easily accept, adhere to, and even embrace international law for it was conducive to an economy and social order compatible with that of the United States. Even the political order was similar, as the President was akin to and enjoys the powers of a monarch in the field of foreign affairs.

North Korea, on the other hand, is an aberrational state. The Korean Peninsula was for centuries one state. World War II and the subsequent occupation divided the country in the center. The southern half of the Peninsula established a government by free elections under the supervision of the

²⁰⁸See Bailey, supra note 3, for an interesting overview of the development of the United States from an international perspective.

probably not survive. The constant escalation may be a
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view of the development of the United States from an inter-
national perspective.

United Nations. The northern half is ruled by a regime created and imposed upon the people by the Soviet occupiers. This "state" is recognized solely by the communist bloc of nations. The great majority of the United Nations members recognize the government of the Republic of Korea as the only properly installed government of that Peninsula. This Republic is a strong democracy, growing increasingly powerful. The North depends on its ally, the Soviet Union. It has never participated in the development of international law. It is kept outside the workings of that law by the international community of nations. It is a very small and weak state. Although it is technically required and expected to observe international law, it is denied an international forum with regard to its external disputes. In comparison with the United States, a great nuclear power, the People's Republic of Korea is almost insignificant in might. Its actions therefore must be observed not only against the requirements of the Law of Nations, but against the propriety of the actions of the United States as well.

2. The Claimants' Objectives Regarding the Pueblo and its Seizure.

The United States, a major creator and sponsor of the United Nations, had hoped thereby to maintain the status quo in the world following the Second World War. Europe was to be rebuilt; the defeated nations were to lose their conquered territories and Germany was to be temporarily divided; no

United Nations. The northern half is ruled by a regime created and imposed upon the people by the Soviet occupation. This "state" is recognized solely by the communist bloc of nations. The great majority of the United Nations members recognize the government of the Republic of Korea as the only properly installed government of that Peninsula. This Republic is a strong democracy, growing increasingly powerful. The North depends on its ally, the Soviet Union. It has never participated in the development of international law. It is kept outside the working of that law by the international community of nations. It is a very small and weak state. Although it is technically entitled and expected to observe international law, it is denied an international forum with regard to its external disputes. In comparison with the United States, a great nuclear power, the People's Republic of Korea is almost insignificant in size. Its actions therefore must be observed not only against the requirements of the law of nations, but against the propriety of the actions of the United States as well.

7. The Elements, Objective Requirements, the People and its Beliefs.

The United States, a major creator and sponsor of the United Nations, had hoped thereby to maintain the peace and in the world following the second world war. Europe was so devastated that the United Nations was to have been organized to maintain the peace and democracy was to be unopposedly dominant in

states was to be humiliated, and the five great powers were to benevolently and firmly cooperate in maintaining the peace and preventing world conflagration.

The United States soon became disillusioned with the ability of the United Nations to fulfill its purposes. The Soviet Union succeeded in setting up puppet regimes in every Eastern European and Asian nation she occupied. One author claims that she also assisted in the defeat of Nationalist China at the hands of Mao Tse-tung.²⁰⁹ At the same time, the Soviet Union prevented United Nations interference by the use of her negative vote and a technique called the "double-veto" to undermine the deliberations and actions of the Security Council. In June 1950, with the absence of the Soviet representative, the United Nations succeeded for the first time in repelling an invasion of South Korea--a threat to world peace. The United States came to rely on regional arrangements to contain Communism. This was viewed as legitimate self-defense under Article 51 of the United Nations Charter. The United States considered that in saving the weaker nations from being overtaken by communists, whether local or alien, it was actually defending the United States. For the values involved--liberty, freedom, and the right to pursue one's own destiny--were both inclusive and exclusive in nature. The economic structure of

²⁰⁹Bailey, supra note 3, pp. 746, 764, 780, 790, 817, 831 & 863.

states was to be humiliated, and the five great powers were to dominate and firmly cooperate in maintaining the peace and preventing world conflagration.

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²⁰²Malley, *op. cit.*, pp. 765, 766, 780, 790, 817.

the United States virtually required a free world in order to survive and function for trade was essential to its operation. Much more important was that the principles upon which this country was founded required that, as it was not a world leader, it must universally defend and protect these inalienable rights--not only for ourselves but, as custodians, for other nations around the globe. The United States had hoped such pursuits would be a world effort, but the United Nations was not capable of the task as the United States saw it.

The immediate objectives of the United States in its use of the Pueblo was the acquisition of information. This was for defensive purposes as the United States saw it. Its obligations to South Korea required that all available information be gathered for defense should an attack come from the North. The North was considered as an avaricious power, ready to forcibly absorb South Korea and reunite the country. The increased agitation and infiltration in the five months preceding the Pueblo seizure in fact justified United States concern.²¹⁰ Indeed, this participant hoped that continued surveillance and patrol would reduce the pressure on the South.

With the United States already occupied in South Viet-Nam it is unlikely that there was any intent by that power to invade or in any way commit what could be called direct aggression against the North Korean territorial integrity or political

²¹⁰Chap. II, supra.

The United States virtually captured a free world in order to survive and function for trade was essential to its economy. Much more important was that the principle upon which this country was founded required that, as it was not a world leader, it must universally defend and protect these inalienable rights—not only for ourselves but, as responsibilities, for other nations around the globe. The United States had found much guidance would be a world effort, but the United Nations was not capable of the task as the United States saw it.

The immediate objectives of the United States in its use of the Public Law was the acquisition of information. This was for defensive purposes as the United States saw it. Its obligations to South Korea required that all available information be gathered for defense should an attack come from the North. The North was considered as an ever-present power, ready for possibly abrupt South Korea and threaten the country. The increased agitation and infiltration in the five years preceding the Public Law were in fact justified United States concerns. In 1950, this participant hoped that continued surveillance and patrol would reduce the pressure on the South.

With the United States already occupied in South Vietnam it is unlikely that there was any intent by that power to invade or in any way benefit what would be called direct aggression against the North Korean territorial integrity or political

independence at that time. Rather, intelligence-gathering was considered as a method of self-defense. As the Pacific Ocean was no longer considered enough assurance of protection for the United States, its allies must be kept strong and confident of United States assistance. From the United States viewpoint the use of intelligence ships was not considered aggression or a violation of international law.

The North Korean objectives were of a different nature. That government considered its southern counterpart a puppet regime, and like its southern neighbor desires a reunification under its own authority. North Koreans have for some time violated the Armistice Agreement to further their government's objectives, the boldest effort being the attempted assassination of the President of the Republic of Korea.²¹¹

The immediate objectives of the People's Democratic Republic of Korea in seizing the Pueblo must be surmised as proof is not available. Certainly that government wished to halt the leak of military, geographical, and communications information to the United States, the secrecy of which it considered valuable, if not vital, to its defenses. Undoubtedly they hoped that such intelligence-gathering missions might stop due to the inability of the United States to defend such missions or to the clamor raised by irate nationals in the United States. It is probable that it also desired to weaken

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Chap. II (A) 2, supra.

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the alliance between the United States and South Korea by showing the latter that its protector was a "paper tiger," unlikely to risk another war in Asia for South Korea--regardless of the provocation.

In addition, it appears that the North Korean Government, ignored by its allies and lagging behind its enemy in development, wished to bolster its image with its friends and generally improve its position among the communist states and its own people by showing "a threat" to its existence and a courageous act of retaliation.²¹²

These goals are certainly of a defensive nature. Unless some bold action was taken against the South and its ally--the United States, the South might invade the North. But if the purpose of the seizure lay solely in impressing the dissatisfied people within the Democratic People's Republic, that indeed there was a crisis so that Kim's regime would continue secure, the seizure becomes aggressive and illegal and the claim of self-defense could no longer be easily supported.

²¹² N.Y. Times, Jan. 30, 1968, at 8, col. 4. Observers reported prior to the Pueblo Incident that the regime of Kim Il Sung was in trouble, beset by economic and political difficulties. The North Korean Government was having problems with the U.S.S.R. and experiencing a cooling of relations with Red China. A number of top-echelon party personnel had been purged. Kim Il Sung wanted his people to have more to think about than high taxes and a stagnating economy to support a tremendous military machine.

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continuous military machine.

3. The Methods Used by the Claimants to Win Their Objectives.

The United States never claimed its use of intelligence-gathering vessels in the Sea of Japan was self-defense but rather that it was an activity permissible, or at least not prohibited, under existing international law. This is only a partial explanation. The use of chemicals and biological weapons of massive destruction were not prohibited as a matter of international law during either world war, yet neither side used such weapons because the result was unnecessary, extreme, and wasteful of resources, and the sanctions against such activity were substantial.

The use of these vessels was considered acceptable because they were only coercive insofar as the one side knew the other was acquiring information with every communication it made. No military coercion existed. The sanctions were adequate in that both sides could seize the other's vessels, if necessary, in retaliation for a similar act on the other side. Both could look to the law of the sea to enforce their rights to maintain such use of the open sea under customary international law. The Soviet Union and the United States, being great naval powers, have equally as much to gain or lose by ignoring the freedom of the open seas, as they understand it, regarding intelligence vessels.

These vessels are basically defensive as they are used to acquire knowledge of the enemy's offensive capabilities--

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These vessels are basically defensive as they are used to acquire knowledge of the enemy's offensive capabilities.

especially submarine and aircraft communications systems. These vessels themselves pose no threat of immediate hostile armed attack nor do they precede one. Rather, they seem to serve as a warning to their "victim" that prudence is the best course to follow. The use of such vessels appears to be a means of self-defense, rather than aggression. However, there must be aggression before self-defense is justified, certainly on the level of armed hostilities. Here, no armed hostilities existed between North Korea and the United States. No doubt a threat existed, as North Korea considered South Korea and the United States enemies. The activities of the North against the South were undoubtedly hostile. The presence of the Pueblo was chosen as a heretofore permissible alternative to retaliatory raids which, while not actively harmful, would not only provide useful information in the event of a conflict but would discourage further incursions into South Korea.

The North Koreans, on the other hand, claimed strict observance of the Armistice and considered the Pueblo as a threat to her military defensive shield. As a response to this threat she had many modalities of self-defense under international law to choose, in order to settle her dispute with the United States regarding the Pueblo: diplomatic, mass communications, economic and social pressures, and armed force being the most common. Granted that economic and social pressures could not successfully be brought to bear against the

especially submarine and aircraft communication systems. These vessels themselves pose no threat of submarine warfare aimed attack nor do they present one. Rather, they seem to serve as a warning to their "victim" that pressure is being put on them to follow. The use of such vessels appears to be a means of self-defense, rather than aggression. However, there must be aggression before self-defense is justified, something on the level of armed hostilities. Here, no armed hostilities existed between North Korea and the United States. No doubt a threat existed, as North Korea considered South Korea and the United States enemies. The activities of the North against the South were undoubtedly hostile. The presence of the People was chosen as a provocative gesture. It was not only a retaliatory tactic which, while not actively harmful, would not only provide useful information in the event of a conflict but would discourage further incursions into South Korea. The North Koreans, on the other hand, claimed active observance of the Armistice and considered the People as a threat to that military defensive shield. As a response to this threat the use of hostilities of self-defense under international law is obvious, in order to settle the dispute when the United States regarding the People diplomatic, economic, social and political questions, and armed force being the last resort. Granted that economic and social problems could not successfully be brought to bear against the

United States by North Korea since neither economic nor social interrelationships exist between the two parties, there are other non-military coercive tactics available. North Korea apparently made an attempt to use mass communications by broadcasting warnings concerning the continued use by the United States of "spy ships" off the coasts of Korea and its readiness to act against them shortly if their use continued. This occurred shortly before the Pueblo was seized.²¹³

Official diplomatic avenues were not readily available since neither nation recognizes the other or maintains official missions in the other's capital. Although the Military Armistice Commission at Panmunjom was chosen as the forum to settle matters after the seizure, the North Koreans did not use it as a means of declaring their displeasure at the presence of the vessel. Whether this was because they felt that it was a dispute solely between the United States and themselves, unrelated to the Armistice and the United Nations Forces, or because they believed negotiations of any kind would be fruitless, they chose to act through military coercion to bring to an end an odious snooper. It is possible that military coercion was chosen because it was the only modality which served the

²¹³N.Y. Times, Jan. 27, 1968, at 1, col. 6. A Japanese newspaper, Sankei Shimbun, said that North Korea had warned of its readiness to act against the Pueblo two weeks before the incident occurred. The broadcasts did not refer specifically to the Pueblo but rather to the United States "spy ships" gathering information while sailing in the midst of South Korean fishing fleets.

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Continuing Information while sailing in the Gulf of Korea.
Korean flagging line.

objectives sought after. If this is the case, those objectives would be coercive rather than self-defensive in nature. The choice made---seizure of the vessel and its crew---when the vessel could have been forcibly driven off, out of the coastal seas or even beyond any claimed adjacent contiguous security zones, especially when viewed together with the demands of the North Korean Government upon the Government of the United States, indicates an apparent preference for aggressive tactics by the North Korean authorities which weakens their claims that they acted only in self-defense.

4. Limitations in Claims of Self-Defense.

The very conception of self-defense implies that the purpose of the defender is to conserve its values rather than extend them through acquiring or destroying values held by the opposing participant.²¹⁴

The principle of conservation requires that only an effort necessary to stop or repel an invasion of rights may be adopted to the threatened party.²¹⁵ Just as a massive attack permits a massive retaliation, a minor invasion of rights or an interference with lesser values allows only a response sufficient to prevent the denial of those rights.

In the Corfu Channel Case²¹⁶ the International Court of Justice held inter alia that Great Britain did not violate international law by her naval vessels transversing the Corfu Channel, an international strait, with guns manned and at the

²¹⁴McDougal and Feliciano, supra note 190, p. 222;²¹⁵Id.

²¹⁵1949 I.C.J. Rep. 4, at 169.

objective would be. It is in the same, those objectives
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4. Limitation in Right of Self-Defense.

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Part 214

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In the North Channel case²¹⁵ the International Court of
Justice said that all that was at stake was the
international law of the North Channel. The Court
stated, an international right, with some content, and it is

²¹⁵North Channel Case, 1969, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

ready since the Albanian armed interference prior to this transnavigation (during which the British naval vessels suffered substantial damage from mines located in the channel) entitled the British to this action as a means of self-defense, thus not depriving the transversal of its innocent nature under international law.

This decision would appear to favor the United States position in regard to the Pueblo seizure. The Pueblo represented no armed threat to the North Koreans. The values the United States was attempting to preserve in maintaining the Pueblo in the Sea of Japan were "enlightenment": the acquisition of information of a scientific and military nature for the security of the South Koreans as well as its own personnel; "well-being": the protection of its personnel in South Korea and to maintain the peace and security of the world by discouraging an incursion into South Korea by the North Korean forces; "respect": by demonstrating to its allies and enemies that the United States would honor its commitments around the globe by performing its obligations as it considered necessary for their defense; and, "power": in that the information acquired would contribute to the arsenal of alternatives and weapons at its disposal if hostilities do erupt.

At the same time, the values "threatened" by the presence of the Pueblo appear, to Western eyes at least, to be comparatively insignificant. The territorial integrity and political

ready since the Albanian armed interference prior to this
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This decision would appear to favor the United States
 position in regard to the Radio station. The Radio report-
 stated no mines were laid in the North Korean. The values the
 United States was attempting to preserve in maintaining the
Radio in the Sea of Japan were "enlightenment": the acqui-
 sition of information of a scientific and military nature for
 the security of the South Korean as well as its own per-
 sonal; "well-being": the protection of its personnel in South
 Korea and to maintain the peace and security of the world by
 disseminating an education into North Korea by the North Korean
 forces; "peace": by demonstrating to the allies and enemies
 that the United States would honor its commitments should the
 allies by performing its obligations as it considered necessary
 for their defense; and, "power": to that the information
 acquired would contribute to the arsenal of American and
 weapons as its disposal if hostilities do erupt.

At the same time, the value "enlightenment" by the presence
 of the Radio station, to Western eyes at least, as the source
 of the Radio station. The Radio station's political

independence of North Korea was in no way threatened. The "well-being" and "self-respect" of that Government was affected in an internal manner as loss of face was felt by the vessel's presence. But neither South Korea, nor the communist allies of the North, nor the world at large would respect the People's Democratic Republic of Korea less due to the presence of the Pueblo in the Sea of Japan. The "power" value was not substantially affected or diminished as a result of the intelligence ship's presence, and it is difficult to see how the internal power of the Government could be in any way detrimentally affected.

As Professor McDougal points out, the denial of inconsequential or trivial rights or value claims even by armed interference warrants appropriate remedies, retaliations, and reciprocities other than high-level coercion.²¹⁷ Therefore, permissible self-defense is the right to exercise otherwise illegal high-level military coercion to protect important and substantial values--thereby implying the need for "necessity" and "proportionality" in response to any attempt at the invasion of substantial values.

Had there been any real threat of invasion by the United States based on the presence of the Pueblo, how much greater would the invasion of North Korea be after it seized a military

²¹⁷ McDougal and Feliciano, supra note 190, p. 227.

independence of North Korea was in no way threatened. The

"well-being" and "self-respect" of that Government was

attacked in an internal manner at loss of face and dignity.

Yosoe's presence. And within South Korea, not the communist

allies of the North, nor the world at large would respect the

people's democratic government of Korea less due to the presence

of the Radio in the case of Japan. The "power" value was not

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ference ship's presence, and it is difficult to see how the

internal power of the Government could be in any way substantially

affected.

As Professor Mayhew points out, the denial of internal

independence or internal rights of value alone even by armed

interference without appropriate conditions, restrictions, and

restrictions other than high-level coercion.¹¹⁷ Therefore,

denial of self-determination is the right to economic activities

illegal high-level military coercion or protect dependent and

substantial value—thereby implying the need for "necessity."

and "proportionality" in response to any attempt at the invasion

of substantial value.

Had there been any real threat of invasion by the United

States based on the presence of the Radio, how much greater

would the invasion of North Korea have been if it had a military

¹¹⁷ Mayhew and Johnston, op. cit. p. 117.

vessel and its crew belonging to a far stronger nation than itself. The threat to the primary values of the nations attacked must always be kept in mind, for nations sincerely seeking to maintain a peaceful world public order system will not seize any and every incident to claim the right of self-defense and proceed to launch a violent retaliation on the state or its instrumentalities which allegedly caused the first injury. Therefore, while the response of the North Korean Government to the presence of the Pueblo is not sanctioned by international law, a United States response to the seizure of the Pueblo cannot logically extend to full retaliation under the doctrine of self-defense. There is an evident distinction between the seizure of a foreign man-of-war, though clearly not permitted by international law in peacetime, and a threat to the territorial integrity or the political independence of the nation whose vessel is seized sufficient to justify a high level of military coercion made legal by a claim of self-defense.-- Just as the United States failed to declare war on Japan for the sinking of the Panay, a small military vessel in China²¹⁸ but did not hesitate to do so after the Japanese attack on Pearl Harbor on December 7, 1941. The difference in value destruction and appropriate and necessary response is evident.

²¹⁸See 15 Bull. of Int'l. News 9 (1938). The Japanese sank the USS Panay in the Yangtze River when they were invading China.

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It is 12 miles, 40 miles, 100 miles (1941). The Japanese
sank the USS Panam in the Tongue River when they were in
Yellow China.

5. The Conditions Needed to Justify Claims of Self-Defense.

Self-defense can be validly invoked only after a rational consideration of the factual elements involved. The relative size and power of the participant charged with aggression, the nature and consequences of the objectives, the character of the power's internal structure, the type of coercion applied, the world public order system it desires, and its expectation of community intervention expected are all factors to be considered.²¹⁹

Undoubtedly North Korean decision-makers, in deciding to seize the Pueblo, considered the above factors prior to choosing the course they would follow. They realized that the United States was immeasurably larger and more powerful than North Korea. This, standing alone, would discourage any retaliation in the form of a seizure. However, other aspects had to be considered. The Soviet Union could be expected to be as desirous of protecting the existence of the People's Democratic Republic of Korea as the United States was anxious to maintain in existence the Republic of Korea. This western monolithic state was engaged in a land war in South Viet-Nam which severely limited its ability to respond elsewhere. The United States objectives were preventive in that it wanted to deter an invasion of South Korea. Therefore the "aggression"

²¹⁹ McDougal and Feliciano, supra note 190, p. 230.

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claimed by North Korea against the United States through the Pueblo must rest in its taking information which, due to the nature of that information, was in reality a threat to the existence of that Korean Government. For it could not be argued that the loss of prestige to North Korea created an interference with values considered vital to it or the world community. Certainly the United States did not want another war on its hands in Korea, and it was obvious that the Pueblo did not spearhead any projected invasion.

The internal structure of the United States also served to influence the North Koreans' decision. Since its institutions permitted popular pressure on the Government and the war in Viet-Nam was becoming continually more unpopular, a coercive response to the seizure of the Pueblo was not likely. North Korean authorities could see that the United States did not relish war and that its people considered human life a very precious commodity. These factors would serve as a leavening to prevent further violence after the seizure.

The coercion being applied by the United States was rather mild but it became intolerable for the North Koreans. Substantial face was lost by the presence of the intelligence ship and it feared that its allies were no longer particularly interested in its progress. In any case, the coercion was considered sufficient justification by the North Korean decision-makers, at least when considered with the remaining factors, to provoke the seizure of the vessel.

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The United States wanted a relatively peaceful world and desired a world public order system in which it could prosper and grow and continue to be the great power that it was. In the North Korean view this would include some wars undoubtedly, as such is necessary in their view for a capitalistic economy to survive. Nevertheless, the United States was already involved in one war--a costly one--and the world generally resented United States efforts in Viet-Nam. Her allies traded with her enemies. A relatively free and unified world was necessary for United States prosperity, and all could be lost by new and more costly wars.

The United States could not have any illusions about world assistance in Korea. The Pueblo project was strictly a United States effort. The world community would hardly take any action against North Korea should it seize an American war vessel claiming "trespass." The Korean effort of the United Nations of the 1950's was the only attempt of that body to enforce world peace on unwilling participants. It was not likely to recur.

The presence of the Pueblo was humiliating and the only means of preventing intelligence-gathering was to take a dramatic step. The United States would obviously insist that intelligence-gathering was legal under international law, based on the doctrines of extraterritoriality of war vessels and the right to use the open seas at will as long as the right

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war vessel claiming "freedom". The Korean effort of the
United Nations of the 1950's was the only attempt of that body
to achieve world peace or unifying participation. It was not
likely to occur.

The purpose of the Yupio was unification and the only
means of preventing intelligence-gathering was to make a
united effort. The United States would not only insist that
intelligence-gathering was legal under international law,
based on the doctrine of self-determination of peoples
and the right to use the open seas as well as the land.

of others on those seas are not unreasonably infringed thereby. Therefore, neither negotiations nor driving out the vessels would serve a useful purpose. Only a seizure of one of the intelligence ships might successfully force the United States, based on world reaction and reaction at home, to cease the missions entirely.

Once the vessel was seized ~~and~~ the United States, nor charging North Korea with aggression, was forced to consider the protagonist in light of the conditions existing at the time of the seizure.

Here was a relatively weak and insignificant entity. Yet North Korea had powerful and jealous friends and neighbors who would consider any substantial retaliation, such as a forcible attempt to recover the vessel, as a threat to their territorial integrity and political independence. In addition, such an effort would mean a second fighting zone thousands of miles from the United States, yet adjacent to the enemy's sources of supply.

To the United States decision-makers, North Korea's objective would appear to be the elimination of the presence of American intelligence-gathering vessels near her shores together with an attempt to humiliate the United States by demonstrating that it could not defend its own vessels from seizure by a small Asian nation. This would, hopefully, disillusion the Allies of the United States, especially those

of others on those seas are not unnecessarily interrupted thereby. Therefore, further negotiations not driving out the vessels would serve a useful purpose. Only a seizure of one of the intelligence ships might successfully force the United States, based on world reaction and reaction at home, to cease the mission entirely.

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objectives would appear to be the elimination of the presence of American intelligence-gathering vessels near her shores together with an attempt to humiliate the United States by demonstrating that it could not defend its own vessels from seizure by a small Asian nation. This would, naturally, strengthen the allies of the United States, especially those

in Asia, regarding the capacity of that State to protect them. A general disrespect for the United States would be demonstrated throughout the world. In turn, Communist states would gain new regard for North Korea and her sinking image would be replaced by renewed cooperation and assistance from her allies.

The consequences, however, were light. The seizure was humiliating to the United States. But prestige is linked with power. The strength of the United States, and thus its power, is beyond the wildest imaginings of all but a handful of the nations in the world community. The loss of a single ship under the circumstances could not have affected the prestige of the United States. Therefore this primary objective failed. For the same reason, the secondary objective also failed. Various methods of intelligence-gathering continue regardless of the efforts of the North Korean authorities.

The net result is that as no base value of substantial importance to the United States was harmed by the actions of North Korea, no claim of self-defense will properly lie for United States invocation should that State desire to retaliate. Even if the United States decided that the affront required substantial retaliation as a proportional response to the extreme act of seizure of a foreign vessel of war, it must be remembered that the internal politics of North Korea--a dictatorship--effectively controls the people and could thus guide the populace not only to make retaliation difficult or

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impossible but also could also result in harm to the innocent victim of the seizure--the crew of the vessel. There can be no argument that the coercive nature of the seizure was hostile and severe and intolerable under international law. Nevertheless, there exists no threat to the territorial integrity of political independence of the United States itself unless we adopt the fiction that a foreign man-of-war is a floating portion of the flag state. Under the circumstances such an approach would be less than rational.

Regardless of the world order system it desires, undoubtedly it would be in the nature of a communist dictatorial democracy, the policies of acting to accomplish ends regardless of the means clearly indicates that the acts of the North Korean Government was in fact aggressive. The world therefore would never rally to the support of North Korea, although the U.S.S.R. and Communist China might well assist her. It is equally certain that the world community would not rally to the support of the United States in an effort to recapture a stolen naval vessel of little importance to the world at large. The effort could well destroy the world and the risks are out of proportion to any possible advantage that could be gained from the enterprise.

The United States recognized at one time that "necessity" is the most important condition in the application of the doctrine of self-defense. The formula recognized as the

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The United States recognized at one time that "necessity"
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standard was declared by Secretary of State Daniel Webster in the Caroline Incident of 1837:²²⁰ "necessity of that self defense is instant, overwhelming, and leaving no choice of means or moment of deliberation".²²¹ No longer is this formula recognized since it is unduly restrictive.²²² Nevertheless, the only justification for anticipatory self-defense as a legitimate means of coercion requires a goal less than invasion of another state's territory.

The invocation of self-defense to justify military coercion can only be legitimate and proper where substantial base values are being or may well be completely destroyed and where a minimum and limited response is made.

²²⁰See R.Y. Jennings, "The Caroline and McLeod Cases," 32 A.J.I.L. 82 (1938). The facts were briefly as follows: The Caroline was a steamer used by individual U.S. citizens to help William L. MacKenzie, a defeated rebel leader from upper Canada, attempt another invasion of the British colony. The insurrectionists' activity, although strictly illegal, was not suppressed by the United States. Therefore the British took things into their own hands when, on Dec. 29, 1837, a volunteer party crossed over to the American side of the Niagara River and sent the Caroline over the Falls, aflame. At least one American was killed in the foray. This created a substantial international incident because this amounted to an invasion of the United States by the British Army unit which did the deed. The issue arose regarding what is self-defense and when may it be invoked. See also Bailey, *supra* note 3, p. 199 *et seq.*

²²¹2 Moore International Law 409-414 (1906), and note 220, *supra*.

²²²Mallison, *supra* note 203, at 334-48.

standard was dictated by Secretary of State Daniel Webster in the Caroline Incident of 1837.²²⁰ "Necessity of their self defense is instant, overwhelming, and leaving no choice of means or moment of deliberation."²²¹ No longer is this formula recognized since it is wholly restrictive.²²² Nevertheless, the only justification for anticipatory self-defense as a legitimate means of action requires a goal less than invasion of another state's territory.

The invocation of self-defense to justify military action can only be legitimate and proper where substantial harm values are being or may well be completely destroyed and where a minimum and limited response is called.

²²⁰See R.V. Jennings, "The Caroline and McLeod Cases," 33 A.B.T.J. 61 (1909). The facts were briefly as follows: The Caroline was a steamer used by individual U.S. citizens to ferry William L. Mackenzie, a detained rebel leader from Upper Canada, across another invasion of the British colony. The internationalist's activity, although strictly illegal, was not suppressed by the United States. Therefore the British could bring into their own harbor when, on Dec. 29, 1837, a volunteer party crossed over to the American side of the Niagara River and went the Caroline over the falls, sinking it. At least one American was killed in the process. This caused a substantial international incident because this amounted to an invasion of the United States by the British army with which the deed. The issue arose regarding what an self-defense and when may it be invoked. See also Bailey, supra note 2, p. 199.

²²¹See Caroline International Law 409-412 (1906), and note 220, supra.

²²²See Caroline, supra note 207, at 234-48.

6. Effects and Proportionality of the Responding Coercion.

The effects of the coercion, therefore, to legally permit the responding coercive action must not only be made necessary by the coercive acts of the participant to be charged with aggression, but likewise must itself be limited in intensity to that amount of force required which will properly and effectively secure the objectives permissible and sought after in the self-defense exerted.

The North Koreans may well be within their rights to seize the Pueblo in order to achieve their objectives if the Pueblo's activities constitute aggression. This assumes that no other less destructive means could be found to protect its interests. It is difficult to demonstrate that the Pueblo's activities were in fact aggressive.

The United States on the other hand was limited in its options to retaliate for the seizure. It is probable that the United States cannot claim any right of self-defense under existing international law since neither its territory nor its political independence, its economic strength, its government, or its people were seriously threatened by the incident, except of course the crew of the vessel which was captured with the vessel. As no necessity exists, any violence threatening the territory or political integrity of North Korea would be out of proportion and could justify a censure of the United States

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by the United Nations under Article 2(4) of the United Nations Charter.

The net result appears to indicate that a small nation such as North Korea can violate customary international law and remain beyond reach of the great states of the planet whenever the insult is not worth the risk of a world in flames.

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VI THE LIMITS OF CURRENT INTERNATIONAL LAW IN CORRECTING
THE INADEQUACY OF THE PRESENT WORLD ORDER SYSTEM
IN FACE OF A MILITARILY COERCIVE ACT
SUCH AS THE SEIZURE OF A WARSHIP

A. The Result of the Incident Relative to
International Law

The Pueblo Incident and its aftermath solved nothing as far as the desires of the protagonists were concerned, and yet reached the only possible solution necessarily outside of the world public order system short of an actual world holocaust. International law had no part in the solution of this difficult coercive situation, but rather the international facts of life determined the result. This situation differed from the Liberty incident, where Israel fired a missile at a United States vessel gathering information, because Israel was a friend, not an enemy.²²³

North Korea did not deter the intelligence-gathering activities of the United States, as was clearly demonstrated by

²²³ N.Y. Times, June 9, 1967, at 1, col. 6.

VI THE LIMITS OF CURRENT INTERNATIONAL LAW IN COMPARISON
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A. The Result of the Incident Relative to International Law

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 activities of the United States, as was clearly demonstrated by

¹²² U.S. News, June 8, 1967, at 1, col. 6.

the EC 121 Incident of April 1969.²²⁴ That government may have harmed the prestige of the United States, but not in any significant manner. The North Koreans gained much information from the electronic gear and information on the vessel which is difficult to value.

The United States failed to get ~~the~~ vessel back, but succeeded in getting the men back, which certainly improved its image as a humanitarian state in the eyes of the world. The ship will be of little practical value to the North Koreans, although the Soviet Union could make some use of it as a vessel. No matter how costly, the United States will make the vessel and its equipment obsolete--thereby rendering even that acquisition valueless. Thus, the humiliations and recriminations between the principals to the dispute and their respective allies only worsen the distrust between the two worlds, and nothing of positive significance has actually been accomplished.

B. Acts Authorized in Intelligence-gathering Activities by States under International Law

As "spying" is sanctioned by international law, only if and when such persons are captured within the territory of

²²⁴The Washington Star, Apr. 15, 1969, at 1, col. 8. It should be noted that the North Koreans apparently partially succeeded in their goals. No American intelligence-gathering ships are known to have sailed near the North Korean coasts since the seizure of the Pueblo, as of December 28, 1968. See Buffalo Evening News, Dec. 28, 1968, at A2, col. 3.

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another state where they are pursuing their activities are they subject to punishment as provided for such offenses under the municipal law of that state.

1. Space Spying.

The "spy in the sky" or the orbiting satellites are not prohibited by international law. Historically, international law was formed by the practice of states, as indicated by the development of the law regarding territorial waters described earlier in this paper. Only two nations are presently capable of engaging in placing orbiting ~~satellites~~ satellites for information-gathering, or any purpose, into space. Both states have apparently decided to refrain from attempting to acquire title to any part of space, but rather keep space open and "free"--akin to the concept of freedom of the open seas. International law at present prohibits no activity in free space. Both states have orbiting satellites which report to their receiving stations in the launching state whatever is seen through cameras or heard through radio and radar receivers. Only the United States and the Soviet Union are capable of interfering with such activity or participating in it, and both have chosen by practice to allow such activities and to maintain a "peaceful space."

2. Activities in the Airspace.

As we get closer to Earth we see a different development of the law. Since World War I the nations of Earth have

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jealously guarded their airspace. The Paris Convention on Aerial Navigation of 1919²²⁵ declares in Article 1: "every Power has complete and exclusive sovereignty over the ~~air~~ space above its territory... ." In addition, there is no right of innocent passage of any aircraft through the airspace above its territory except by treaty. The 1958 Geneva Conference on the Law of the Sea makes this quite clear.²²⁶ The U-2 incident in May 1960 demonstrated what a clear violation of international law can mean in consequence of a failure of intelligence gathering through use of military aircraft.²²⁷ Any violation of a state's airspace by a foreign military aircraft justifies that state in forcing that craft to land within its territory by any means and subjects the pilot thereof to prosecution.

²²⁵11 L.N.T.S. 173.

²²⁶Bishop, supra note 161, at 373. See Lissitzyn, "The Treatment of Aerial Intruders in Recent Practice in International Law," 47 A.J.I.L. 559 (1953). See also U.S. Naval War College, supra note 32, at 122, n. 133.

²²⁷In May 1960 a U-2 aircraft, flown by Gary Powers of the United States (of the CIA) was shot down allegedly by the Soviet Union while well within the latter's airspace. It produced at first a denial, and then an admission from top United States Government officials that the mission had been officially authorized to fly over the airspace of the Soviet Union in violation of international law. The result was a spy trial for Gary Powers and a refusal by the Soviet Premier to meet with the President of the United States in a previously scheduled summit conference. See Encyclopedia Britannica 1961, Book of the Year, p. 355, for a terse review of the incident and its aftereffects.

237 In May 1950 a D-5 aircraft, flown by Gary Powers of the United States (of the CIA) was shot down allegedly by the Soviet Union while within the latter's airspace. It proved at first a denial, and then an admission from the United States Government officials that the mission had been officially authorized to fly over the airspace of the Soviet Union in violation of international law. The denial was a very thin one. Gary Powers and a colonel by the Soviet Premier to meet with the President of the United States in a previously-scheduled summit conference. See *Encyclopedia Britannica* 1951, Book of the Year, p. 352, for a fuller review of the incident and its circumstances.

238 Bishop, *supra* note 161, at 373. See *Disaster*, "The treatment of Aerial Incidents in Recent Practice in International Law," 47 A.D.I. 1522 (1953). See also U.S. Naval War College, *supra* note 32, at 112, n. 131.

239 11 A.M.T. 173.

240 *Id.* at 173.

241 *Id.* at 173.

242 *Id.* at 173.

243 *Id.* at 173.

244 *Id.* at 173.

245 *Id.* at 173.

246 *Id.* at 173.

247 *Id.* at 173.

248 *Id.* at 173.

249 *Id.* at 173.

250 *Id.* at 173.

251 *Id.* at 173.

252 *Id.* at 173.

253 *Id.* at 173.

3. Intelligence Gathering Activities at Sea.

The Pueblo Incident added a completely new dimension to the intelligence-gathering systems of the great powers.

The Soviet Union and the United States accepted the fact that international law in providing for (1) freedom of the open seas and (2) the extraterritoriality of foreign men-of-war virtually protected intelligence-gathering in the open seas adjacent to the victim state as long as it was pursued under those mantles. Since such activity could not be prevented, both States used these activities for protection. Trespassing into foreign territorial waters could lead to an embarrassing "snafu" because these Powers did not wish to publicize their snooping activities, and the sanctions provided by international law entitled the other to drive off an interloper from its territorial seas. Such an occurrence would prove embarrassing. A seizure, however, was undoubtedly never contemplated by either side because it was considered legally impossible and undefensible and could create a very substantial international crisis.

C. Sanctions Against such Intelligence-Gathering Activities Provided by International Law

1. Sanctions Against Satellites in Space.

The sanctions against spying on outer space, besides those of a monetary or technological nature, would permit the state injured by such activity to (1) send a spy satellite up to snoop on the other party; (2) scramble and confuse the enemy satellite from its land territory; or (3) to launch diplomatic

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4. Sanctions Against Activities in Space

The sanctions against spying on other space facilities

known of a necessity of technological means, will permit the

states injured by such activity to (1) send a spy satellite up

to drop on the other party; (2) retaliate and capture the spy

satellite from its land territory; or (3) no launch diplomatic

and other international efforts through international organs or local embassies to deter the "spying" state from its activities. To shoot down the "spy satellite" would be questionable at best because it would introduce violence to space, not to mention that the "fallout" from such an act of destruction could injure innocent third parties below. Space is free and can be so used as long as it does not interfere with the rights of others in space. As of now there is no law specifically providing sanctions for or against orbiting intelligence-gathering satellites.

2. Sanctions Against the Use of Airspace for Intelligence Gathering.

The sanctions provided for violations of a state's airspace by a foreign state's airships in time of peace are set forth in the Regulation of Aerial Navigation of 1919.²²⁸ It provides that it can prohibit all private craft from flying over its territory for military or safety purposes, and that no military or other state aircraft of foreign states may fly over or land in a state's territory without permission. If such aircraft do "trespass" and then land in foreign territory, they are entitled to no extraterritorial privileges. Any foreign aircraft crossing a state's airspace can be forced to land within that jurisdiction and be subject to the laws of that state. No protection is granted by international law. If an

²²⁸ Oppenheim-Lauterpacht, supra note 51, at 519-21.

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¹²⁸ Convention for the Regulation of Aerial Navigation, signed Oct. 13, 1919.

alien is suspected of spying he can be tried under the local laws. There is no "innocent passage" of aircraft in foreign airspace.

3. Sanctions Provided by International Law to Intelligence-Gathering Vessels on the Seas.

The sanctions available to a foreign man-of-war's presence in the seas off the coast of the victim state are quite limited in international law because of the protections granted to such vessels. Assuming that the 1958 Convention applies and has a status as international law, a foreign man-of-war beyond twelve nautical miles is beyond even the contiguous zones of littoral states and can use the open seas in any way she desires subject only to the limitation that such activity will not unreasonably interfere with the rights of others in their use of the open seas.²²⁹

But assuming that a violation of the territorial seas or the applicable contiguous zones by a foreign warship, the adjacent state can complain through diplomatic channels or, if necessary, drive the culprit out of its territory. Seizure is prohibited since a foreign man-of-war clearly possesses an extraterritorial status. Under present international law intelligence-gathering beyond the jurisdiction of the coastal state is as reasonable a use of the open seas as is fishing.

²²⁹See the 1958 Convention on the Territorial Seas and the Contiguous Zone, art. 24(2). See also 1958 Convention on the High Seas, art. 2.

either is suggested or saying he can be tried under the local law. There is no "innocent passage" of aircraft in foreign airspace.

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¹ See the 1958 Convention on the Territorial Seas and the Contiguous Zone, art. 24(1). See also 1958 Convention on the High Seas, art. 2.

These sanctions work well between large nations with interests that encompass the world community. They will function almost perfectly where the interaction between the parties exists on a more or less equal plane. Both the United States and the Soviet Union use warships as intelligence-gathering media. A violation by one of these states against the other would bring an easily determined and proportional response--perhaps a seizure for a seizure, or such other action which could be taken where both states wish to maintain a good image in the world community.

International law provides no guidelines or sanctions regarding initial action or response to acts of an aggressive nature between small states such as North Korea and large states like the United States. North Korea has no intelligence ships against which the United States could take action. There is no forum in which she can be taken to task and made to account for her aggressive actions. North Korea has no interest whatever in recognizing a right to use intelligence vessels by other member states of the world community.

So, while international law capable of solving this problem is developing, it remains for the individual members of the world community of nations, especially the great powers, to control their behavior in response to acts taken against them which are unsanctionable under present international law. Only by such self-discipline can an answer to this dilemma

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Only by such self-discipline can an answer to this dilemma

be found without the risk of a total destruction of the present world order process.

D. Ultra Vires Acts and Their Consequences

The seizure is quite clearly beyond the existing law as it is not a recognized sanction in international law. The "aggression" by the vessel cannot be considered so serious an aggression, if it is aggression at all, as to justify the violent military solution used by North Korean naval forces.

In 1866, an American sailing vessel, the General Sherman, sailed up the Han River to break the isolation of, and open trade with, the Kingdom of Korea. When the vessel reached what is now Seoul the tides ebbed, stranding the schooner on a sand bar. The Korean forces, on orders from the monarch, fired the vessel and massacred the crew. In the Spring of 1871 the United States sent a squadron of five ships under Rear Admiral Rofers to Seoul, and after being fired upon a landing party was dispatched to avenge the insult and the massacre. After destroying a number of Korean forts and killing over two hundred of the Korean forces in the rout, the squadron withdrew.²³⁰

The violence of the North Korean actions could have reaped a whirlwind of vengeance. At first the United States Government demanded immediate redress or threatened dire and drastic consequences which might well have been justifiable under

²³⁰ N.Y. Times, Jan. 24, 1968, at 15, col. 6. See also Bailey, *supra* note 3, at 314.

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In 1966, an American sailing vessel, the General Sherman,
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trade with, the Kingdom of Korea. When the vessel reached what
is now Seoul the river ended, standing the vessel on a
sand bar. The Korean forces, on orders from the monarchy,
fired the vessel and massacred the crew. In the Spring of
1971 the United States sent a squadron of five ships under
Admiral Holm to Seoul, and after being fired upon a
landing party was dispatched to occupy the island and the sur-
rounding area. After destroying a number of Korean forts and killing
over two hundred of the Korean forces in the port, the squadron
withdrew.

The violation of the North Korean position could have caused
a withdrawal of vengeance. At first the United States Government
demanded immediate redress of the situation and the North
Government which will have been justified under

international law and United States historical practice. Reason prevailed. The demand for the vessel's return was abandoned and a humble apology to the North Koreans secured the release of the Pueblo's crew. This did not come about through the legal sanctions provided by the jurisprudence under which the international community functions, but rather it was the international political situation which prevented a United States retaliation which might easily have led to a third global conflict in a century. For to seize a foreign warship in time of peace is clearly an "aggressive" act justifying a declaration of war even under the definition provided by the Soviet Union for United Nations consideration.²³¹ It serves as little consolation that the North Korean Government was right in its belief that the United States would take no step which would impair the lives of the eighty-two crewmen of the vessel, involve the United States in another Viet-Nam, or risk a third world war. Preservation versus destruction of the world lay in the victory of reason over pride, and most frequently in history reason is the loser.

The sanctions available to the United States in this case, short of bombing or invasion of Wonson where the Pueblo was first impounded, were minimal. North Korea is a nation which is

²³¹Hansen, supra note 199, at 93, where the Soviet Union's examples of direct aggression include: "... the carrying out of a deliberate attack on the ships of aircraft of (another state)."

international law and United States historical practice. Hanson prevailed. The demand for the vessel's return was abandoned and a humble apology to the North Koreans secured the release of the Pueblo's crew. This did not come about through the legal sanctions provided by the jurisprudence under which the international community functions, but rather it was the international political situation which prevented a United States retaliation which might easily have led to a third global conflict in a century. For to seize a foreign vessel in time of peace is clearly an "aggressive" act justifying a declaration of war even under the definition provided by the Soviet Union for United Nations consideration. If it serves as little consolation that the North Korean Government was right in its belief that the United States would take no step which would imperil the lives of the eighty-two crewmen of the vessel, involve the United States in another Vietnam, or risk a third world war, preservation versus destruction of the world lay in the victory of reason over pride, and most frequently in history remains the loser.

The sanctions available to the United States in this case, short of bombing or invasion of North Korea where the Pueblo was first impounded, were minimal. With force in a nation which is

¹¹Hanson, *supra* note 12, at 33, where the author notes that the examples of direct aggression include: "... the carrying out of a deliberate attack on the ships of other states (Pueblo case)."

under the protective nuclear umbrella of a powerful world state. At the same time this little state will insist on determining its exclusive interests and values as well as its inclusive interests and values in the world community. North Korea has no world commitments or obligations and is interested solely in its own advantage and progress on a plane much below its nuclear-powered allies and enemies. It has only a small naval force and its nautical interests extend only so far as its fishing fleets ply the seas and to the edge of its limited demesne. The United States, with world encompassing power, has responsibilities of equal expanse. It cannot act carelessly and recklessly since every decision will undoubtedly have international implications. Her ships ply the world seas and her aircraft its skies, and its spacecraft probe the universe. The parochial values are not part of the United States concern for virtually all of its values, even its exclusive ones, are, because of the power of the United States, inclusive in its nature.

In short, North Korea could afford the gamble in seizing an American vessel of war. The United States dared not risk a vengeful retaliation, no matter how justifiable. Whatever navy North Korea has would dare not venture into the open seas alone, and thus the United States is deprived of even a proportional retortion. Any attack on the Korean mainland to recover the vessel would be intolerable to North Korea's allies and

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unthinkable for the United States. For the United States would lose a vast amount of prestige should she so violently disregard the United Nations Charter, even if her actions would not mushroom into an international destruction of community values. Sanctions for large states against small states which do violence to international law do not exist effectively in the present world order system.

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VII CONCLUSION

The situation appears to leave an ultimate choice among three alternatives: First, we can condemn intelligence-gathering activities altogether, thus placing the burden of potential violation upon the powers which use devices to acquire otherwise unavailable information. Or, sanctions can be provided whereby some force is permitted by injured nations against those states who interfere with such activities so that the information-seekers can prevent the loss of their intelligence-gathering personnel and equipment. Thirdly, would be to require the states who are inquisitive to "assume the risk" of their activities. The decision rests upon which alternative will most minimize the risk of international conflagration and yet be most acceptable to the members of the community within the present world order system.

The first two alternatives are virtually impossible. Neither of the great powers, who failed to conclude a disarmament treaty because of lack of trust between them, will give up the right to gather intelligence. Without the cooperation of these states any decision by the remaining members of the community of nations is likely to have little effect. By the

VII CONCLUSION

The situation appears to leave an almost choice among three alternatives: First, we can continue intelligence-gathering activities altogether, thus placing the burden of potential violation upon the powers which use devices to acquire otherwise unavailable information. Or, sanctions can be provided whereby some force is permitted by injured nations against those states who interfere with such activities so that the information-gatherers can prevent the loss of their intelligence-gathering personnel and equipment. Thirdly, would be to require the states who are inquisitive to "assume the risk" of their activities. The decision rests upon which alternative will most minimize the risk of international confrontation and yet be most acceptable to the members of the community within the present world order system. The first two alternatives are vitally impossible. Neither of the great powers, who failed to conclude a disarmament treaty because of lack of trust between them, will give up the right to gather intelligence. Without the cooperation of these states any decision by the remaining members of the community of nations is likely to have little effect. By the

same token, the community of states will not accept any treaty or system of sanctioning power that interferes with their rights to keep the large nations from dominating their affairs. Effective sanctions against seizures are therefore unlikely to be acceptable to any nation. Either of these alternatives, even if adopted, would actually increase tension throughout the world. The banning of intelligence-gathering would increase fears and suspicions of the opponent by both sides. The result could be a greater possibility of an accidental nuclear conflagration. At the same time, a provision in international law to permit limited violence sufficient to prevent Pueblo-type seizures would only be a reversion to the "just war" concept of Grotius and further endanger the peace of the world. International politics require that the great nations work to maintain the confidence of the smaller nations within their sphere of influence, or risk losing them to the other side. The Soviet Union could never insist that North Korea return the Pueblo, because such an act would undermine any influence the Soviet Union possessed over that little state. Any new system tolerating intelligence-gathering likewise will fail for lack of adequate sanctions from the great powers' viewpoint.

As it is unlikely that the present world order system will experience any substantial change in the future toward accommodation of intelligence-gathering, only the actors can

provide protection for their interests in the area of securing information. In light of the current international power process, it is apparent that United States naval activities in the Sea of Japan was at least acceptable in international law and practice. In contradistinction to the Quarantine Interdiction²³² placed upon Soviet vessels delivering guided missiles to Cuba in late 1962, where the existence of the nations of the Western Hemisphere was threatened, justifying defensive action by those states, the People's Democratic Republic of North Korea was never threatened with direct injury of any kind. The threat of nuclear missiles is much more direct than an unarmed intelligence vessel. The coercion of the former is more immediate than that represented by the latter. The United States response to the Cuban missile threat presented by the Soviet Union, and so directed against her, could be more easily tolerated than North Korea's actions against the United States.

The burden falls upon the United States and the Soviet Union and any other Nations that may wish to pursue aggressive intelligence-gathering machinery, where international law fails to provide effective limitations on the procedure due to recent technological advances, to protect their own activities by whatever means of defense they have. This defense

²³² See Mallison supra note 203, for an inquiry into the facts and legal implications of the Cuban Blockade of October 1962.

provide protection for their interests in the area of securing information. In light of the current international power process, it is apparent that United States naval activities in the Sea of Japan was at least acceptable in international law and practice. In contradistinction to the quarantine interdiction²³² placed upon Soviet vessels delivering guided missiles to Cuba in late 1962, where the existence of the nations of the Western Hemisphere was threatened, justifying defensive action by those states, the People's Democratic Republic of North Korea was never threatened with direct injury of any kind. The threat of nuclear missiles is much more direct than an unarmed intelligence vessel. The coercion of the form is more immediate than that represented by the latter. The United States response to the Cuban missile threat presented by the Soviet Union, and so directed against her, could be more easily tolerated than North Korea's actions against the United States.

The burden falls upon the United States and the Soviet Union and any other nations that wish to pursue aggressive intelligence-gathering machinery, where international law fails to provide effective limitations on the procedure due to recent technological advances, to protect their own victims by whatever means of defense they have. This defense

²³²See *Maritime Rules*, note 202, for an inquiry into the facts and legal implications of the Cuban blockade of October 1962.

must be strictly defensive in nature and purpose, and local in effect. Escort vessels for intelligence ships or escort aircraft for legitimate intelligence aircraft could be one form of protection. Should these efforts be unsuccessful or not used, the party to whom the vehicle gathering intelligence belongs should be required to bear the loss--regardless of a violation by the victim state of existing international law. The actual situation created by the Pueblo Incident and its aftermath was fortuitous. It would be advantageous for the peace of the world to consider such practice as international law. Whenever intelligence-gathering missions fail due to the acts of the victim states which the "attacker state" is at the time of the failure helpless to prevent, such failures to and the resultant loss in prestige and property (exclusive of personnel, who should be returned) must be borne by that state.

It would be only through such a practice that the development and maintenance of the important inclusive values of the world community could be maximized and the destructive values such as pride, ambition, and greed between nations be deemphasized so that, even without a world order system or specific international law to prevent destructive incidents such as the Pueblo seizure, the terrible consequences that could ensue would be more surely averted.

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It would be only through such a practice that the development and maintenance of the treatment inclusive within of the world community could be maintained and the desirability values such as peace, freedom, and peace between nations be demonstrated as that, even without a world order system or specific international law to prevent destructive incidents such as the Rosin incident, the terrible consequences that could ensue would be more easily avoided.



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